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DISSERTATION TITLE:

BEE – BASIS, EVOLUTION, EVALUATION
A Critical Appraisal of Black Economic Empowerment in South Africa

STUDENT'S NAME

ANDREA SEKAI M'PARADZI

STUDENT NUMBER

MPRAND001

QUALIFICATION

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SUPERVISOR'S NAME

PROFESSOR EVANCE
KALULA

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I hereby declare that I have read and understood the regulations governing the submission of Postgraduate Diploma dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signature

Signed by candidate

Date.....

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ABSTRACT

This paper is a reflection of the evolution of Broad-Based Black Economic Empowerment (BBBEE/BEE) and an evaluation of the current state of the programme. BEE is one of the most topical subjects in current South African (SA) economic discourse. Born of a need to remedy the ravages of *Apartheid*, BEE has evolved, and indeed continues to evolve, into one of the most elaborate and ambitious empowerment endeavours the world over. BEE aims to integrate a broad base of previously disadvantaged persons into the mainstream economy and to redistribute control over the country's economic resources. An elaborate and comprehensive regulatory framework has been crafted to bring these aims to fruition. This paper provides an overview of this framework, and through a methodical analysis of the governing instruments, the function and legal status of each instruments is clarified and the interrelationship between them is illustrated. It is argued that while this governing structure has aided BEE progress, advancement has been marginal. This can be attributed to the various hurdles that stand to hinder the initiative. This paper further highlights challenges that are both intrinsic and extrinsic to the regulatory framework, with a particular focus on problems of : financing; the broadness of broad-based BEE; fraud and; constraints of attitude. This author concludes that BEE, as a work in progress, is a programme that holds great prospects, if only the surmountable hurdles are overcome.

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GLOSSARY

ANC	African National Congress Empowerment
BBBEE Act	Broad Based Black Economic Empowerment Act 53 of 2003
BEECom	BEE Commission
BEE Strategy Document	The Strategy Document
BMF	Black Management Forum
The Codes	The Codes of Good Practice
DTI	Department of Trade and Industry
DTI GUIDE TO INTERPRETATION	The Department of Trade and Industry ‘The Codes of Good Practice on Black Economic Empowerment – Phase One: A Guide to interpreting the First Phase of the Codes’ (2005)
ICT	Information and Communications Technology
LRA	Labour Relations Act
NEP	New Economic Policy
NP	Nationalist Party
SA	South Africa /South African

SAARF	South African Advertising Research Foundation
SDA	Skills Development Act
SETA	Sector Education Training Authority
SMME	Small to Medium and Micro-Enterprise
SRC	Security Regulation Code on Take-overs and Mergers
Transformation Charters	Sector Transformation Charters
US	United States

1. INTRODUCTORY REMARKS

1.1 INTRODUCTION

Black Economic Empowerment (BEE/BBBEE) is an initiative geared towards spreading economic benefits to a broad base of previously disadvantaged persons. The objective of this paper is two fold - first, it intends to critically analyse the regulatory framework of BEE, and secondly it will assess the challenges facing the drive.

The point of departure will be to outline the historical context giving rise to the need for BEE. This will be followed by a comparative assessment of the economic empowerment programmes undertaken in Malaysia and the United States (US). The value of such comparison is not only to illuminate the general nature of such empowerment enterprises, but also to draw lessons for South Africa (SA) from these experiences. The paper will then turn to a general discussion of the regulatory framework, with a particular focus on the key regulatory instrument - the Codes of Good Practice (the Codes). The second half of the paper will deal with those challenges that manifest within the regulatory framework, and then proceed to consider particularly stark challenges that stand to impede BEE in general. This paper concludes that BEE, as a work in progress, has made marginal strides and has the potential to ensure that a broad base of intended beneficiaries are empowered. However, should the challenges outlined in this paper not be surmounted, this goal may be elusive.

1.1.1 Black Economic Empowerment : A Definition

Black Economic Empowerment (BEE) is an integrated socio-economic undertaking aimed at remedying the inequalities characteristic of *Apartheid*.¹ The programme aims to transform the South African (SA) economic landscape by ensuring participation of the majority of the population in the economy through the transfer of equity, and the

¹BEE Commission 'A National Integrated Black Economic Empowerment Strategy' *BEE Commission Report* 2001 at 2 and also see <http://www.yokogawa.com/za/cp/overview/za-bee.htm> (Accessed on 30/07/2005).

redistribution of control over the country's economic resources.² The need for such an undertaking is born out of a constitutional imperative to rectify the gross economic disempowerment of the non-White majority during *Apartheid* that has resulted in a current mainstream economy that excludes the majority of citizens.³ As a point of departure, this paper will now briefly highlight the economic disempowerment mechanisms employed by the *Apartheid* Nationalist government.

1.1.2 Apartheid and Disempowerment

*Apartheid*⁴ was a system of government predicated on policies of 'racial distinction',⁵ 'ethnic differentiation',⁶ and segregation.⁷ The professed rationale⁸ behind Apartheid was that unified citizenship and integration of SA society was not feasible.⁹ Under the guise of promoting 'the right to self-determination',¹⁰ the notion of separate development was considered not only desirable but necessary.¹¹ Each ethnic group was designated to its own

² BEE Commission (n 1) 2.

³ Osode 'The New Broad-Based Economic Empowerment Act: A Critical Evaluation' (2004) vol 18 No 1 *Speculum Juris* 108.

⁴ The lexical meaning of Apartheid is 'apart-ness'... 'separateness' or 'separation'". (Nortje 'The Origins of Apartheid' in La Guma *Apartheid Collection of Writing on South African Racism By South Africans* 19.) The term denotes 'physically repressive, economically exploitative and ideologically racist or ethnicist segregation'. (Bathish et al 'Apartheid: Ancient, Past and Present' *The TRC: Commissioning the Past, Conference held 11-14 June 1999 University of the Witwatersrand* unnumbered).

The scope of the historical contextualisation of this paper is restricted to the Nationalist Government's *Apartheid* regime. It should be noted as an aside, that in order to fully understand the evolution of political *Apartheid*, attention must be given to those policies that the English element initiated in order to remain politically dominant over the Africans and the Coloureds. Those policies were afterwards adopted by Afrikaners, and they can be classified as follows:

'a) 'Equal' Political rights irrespective of colour or race but subject to such constitutional safeguards which left political dominance in the ends of the English Minority; b) Total exclusion of coloureds from the franchise; c) Territorial separation of the English districts of the Cape Colony; d) Federation of certain territories in order to get new federal safeguards and local self-government for the English element; e) Separate representation for Africans in the Upper or Lower House of Parliament (The Natal Policy (1874-1893); f) Total social, economic and political segregation of Africans and g) Ethnic Differentiation'. (Haasbroek *Apartheid: A Constitutional Analysis: Ethnic diversity and the struggle for Political Supremacy* 36-37).

⁵ Nortje 'The Origins of Apartheid' in La Guma *Apartheid Collection of Writing on South African Racism By South Africans* 19.)

⁶ Haasbroek *Apartheid: A Constitutional Analysis: Ethnic diversity and the struggle for Political Supremacy* 5.

⁷ Haasbroek (n 6) 37.

This segregation pervaded all spheres of life, including cultural, economic, social, political,...and territorial spheres.

(Rhodie et al *Apartheid: Socio-historical Exposition of the Origin and Development of The Apartheid Idea* 25.)

⁸ Nortje (n 5) 21.

⁹ Nortje (n 5) 21. Also see International Labour Office *Apartheid and Labour: A critical review of the effects of Apartheid on Labour Matters in South Africa* 13.

¹⁰ Nortje (n 5) 21.

¹¹ Nortje (n 5) 21.

geographical location with the objective of establishing a self-sufficient area.¹² This separation was purported to be a method of preventing racial clashes and friction.¹³

The actual rationale for the segregationist regime was the survival of the White Afrikaner minority in SA.¹⁴ To this end, the Nationalist Party (NP) leaders pursued policies that systematically disempowered Blacks, Coloureds and Asians.¹⁵ This paper will now turn to outline the nature of and effect of these mechanisms at an economic level.

1.1. 2.1 A History of Segregation: Economic Disempowerment of A Majority

‘The dilemma at the heart of the NP policy [was] that what they most need[ed was] at the same time what they most fear[ed]. They need[ed] Black labour to create White prosperity; but fear[ed] the integration of White and Black in a common society’.¹⁶ As a solution to this conundrum, the NP channelled its efforts towards eradicating permanent Black settlements¹⁷ within White areas and encouraged instead migratory labour.¹⁸ As a consequence of this policy, the homelands¹⁹ were established and the pass laws²⁰ were

¹² Haasbroek (n 6) 5.

¹³ This was one of the reasons proffered by Prime Minister Strijdom of the Nationalist Party. Nortje (n 5) 22.

¹⁴ Haasbroek (n 6) 37. This goal of ensuring white supremacy and survival is starkly apparent in the following statement by Mr Minister Strijdom (soon to become Prime Minister): ‘Our Policy is that the Europeans must stand their ground and must remain *baas* (boss) in South Africa...if the non-Europeans are developed on the same basis as the Europeans, how can the Europeans remain *baas*...Our view is that in every sphere the Europeans must retain the right to rule the country and to keep it a White man’s country’. (Nortje (n 5) 22-24).

¹⁵ Nortje (n 5) 21.

¹⁶ Nortje (n 5) 24.

¹⁷ Business International S.A. ‘Apartheid and Business: An analysis of the rapidly evolving challenge facing companies with investments in South Africa’ (1980) *Business International* 86.

¹⁸ Nortje (n 5) 25. This migratory labour regime, would ensure only temporary integration of Africans into the ‘White economic structure’. (Rhodie et al *Apartheid: Socio-historical Exposition of the Origin and Development of the Apartheid Idea* 26).

¹⁹ Whyte ‘Apartheid and Other Policies’ (undated) no. 17 *New South Africa Pamphlet* 8. The home lands (also called the Reserves) were areas designated specifically for African settlement. These Reserves were impoverished areas largely because of ‘overcrowding, overstocking and soil erosion’, and remained under developed with subsistence farming as the predominant occupation. (Higgs “‘The Bantusans’: South Africa’s ‘Bantu Homelands’ Policy’ in La Guma *Apartheid : A Collection of Writings on South African Racism by South Africans* 79-90.)

²⁰ The pass laws were a form of ‘restriction of movement and influx control’. (Higgs “‘The Bantusans’: South Africa’s ‘Bantu Homelands’ Policy’ in La Guma *Apartheid : A Collection of Writings on South African Racism by South Africans* 88.)

The pass laws were important in the regulation of ‘supply of native labour in the interests of the European’. (Roskam *Apartheid and Discrimination: Some Remarks with regard to the relationships between the white and respective non-white groups in the Union of South Africa* 68.)

These laws required that all Blacks over the age of 16 years of age hold a reference (“pass”) book. (International Labour Office, *Apartheid and Labour: A critical review of the effects of Apartheid on Labour Matters in South Africa* 14.) Any African not in possession of one of these pass books could not be employed. Furthermore, ‘any authorised officer may at any time call upon a native to produce his reference book, and failure to produce the reference book on demand of such an officer [was] punishable with a fine of up to £10 or imprisonment for up

introduced.²¹ The pass laws together with a compendium of legislation²² had the detrimental effect of reducing the scope of employment options available to Blacks²³ and diminishing the bargaining power of these workers.²⁴ This was compounded by the temporary nature of employment, which served to preclude prospects of promotion and proficiency in a particular job.²⁵ Generally, the jobs available to Africans in the White areas were poorly paid²⁶ and required no skills.²⁷ Together with the statutory implementation²⁸ of job reservations²⁹ and the institutionalisation of 'customary exclusions',³⁰ the plight of non-Whites was entrenched.

In light of this historical context the BEE programme was initiated. An enterprise of this type is not peculiar to SA however, as is evident from the Malaysian and the US empowerment programmes. These foreign experiences will now be discussed for their comparative value.

to one month'. (International Labour Office, *Apartheid in Labour Matters: I.L.O Policy Statements and Reports concerning "Apartheid" in Labour Matters in the Republic of South Africa, 1964- 1966* 20-21).

²¹ Nortje (n 5) 25.

²² The legislation enacted to effect influx control included *inter alia*, the Black (Urban Areas) Acts, The Black Labour Act and its regulations, the Black Law Amendment Act and the Black Affairs Administration Act. (International Labour Office, *Apartheid and Labour: A critical review of the effects of Apartheid on Labour Matters in South Africa* 13-14.)

²³ This was so because the passes restricted free movement. (Bathish et al 'Apartheid: Ancient, Past and Present' 1999 *The TRC: Commissioning the Past, Conference held 11-14 June 1999 University of the Witwatersrand* unnumbered).

²⁴ Kotz, D *Social Structures of Accumulation: The Political Economy of Growth and Crisis* 267.

²⁵ International Labour Office, *Apartheid and Labour: A critical review of the effects of Apartheid on Labour Matters in South Africa* 17.

²⁶ Bathish et al 'Apartheid: Ancient, Past and Present' 1999 *The TRC: Commissioning the Past, Conference held 11-14 June 1999 University of the Witwatersrand* unnumbered).

²⁷ Higgs "'The Bantusans": South Africa's "Bantu Homelands" Policy' in La Guma *Apartheid : A Collection of Writings on South African Racism by South Africans* 89).

²⁸ 'Section 77 of the Industrial Conciliation Act gave the Minister of Manpower Utilisation the power to issue a decree reserving any particular job to any particular race,...[furthermore] specific laws such as the Mines and Works Act, which [prohibited] blacks from performing mining jobs that require blasting certificates, and the Black Building Worker's Act, which...denied them the right to do skilled building work outside black areas'. (Business International S.A (n 17) 87).

For a more detailed exposition on job reservation in the building industry, see generally Crankshaw 'Apartheid and Economic Growth: Craft Unions, Capital and the State in the South African Building Industry 1945-1975' (1990) vol 16 No. 3 *Journal of Southern African Studies* 503 at 523-526.

²⁹ International Labour Office, *Apartheid in Labour Matters: I.L.O Policy Statements and Reports concerning "Apartheid" in Labour Matters in the Republic of South Africa, 1964- 1966* 6.

Job reservations were measures that reserved jobs for Whites, thus protecting White workers from possible competition from other races. They prohibited Blacks from doing these reserved jobs,...and 'seriously restricted the range of jobs open to Blacks, [as well as limiting their] scope for advancement within a particular industry'. (International Labour Office (n 25) 18).

³⁰ Customary exclusions resulted from company managerial attitudes. For example, a Black law graduate would not be employed as an articled clerk 'because it would be awkward if the [White] typist had to take dictation from him'. (Business International S.A (n 17) 88).

2. A COMPARATIVE ASSESSMENT OF ECONOMIC EMPOWERMENT

The Malaysian and US programmes are particularly interesting as, empowerment in Malaysia, like in SA, strives to uplift a majority and so provides a useful yardstick for comparison, whereas the US initiative looks to empower a minority.³¹ Several similarities and lessons can be teased out from these experiences and these will be alluded to throughout the paper.

2.1 EMPOWERMENT IN MALAYSIA

2.1.1 A History of Preference: Economic Passivity of a Majority

The Malays and other indigenous people comprise ‘the *Bumiputeras* or sons of the soil’, and represent 61% of the Malaysian population.³² The rest of the population comprises 24% Chinese and 7% Indian.³³ Preferential treatment of the Malays has always been apparent, where from colonial times the Malays had less difficulty owning land, were educated for free and were afforded job preferences in the colonial administration.³⁴ Notwithstanding the preferences, the Bumiputera’s have always played a limited role in the country’s economic development.³⁵ This situation has its roots in the British colonial regime in terms of which the Chinese and Indians provided most of the labour, particularly in the lucrative and major rubber plantation and mining industries.³⁶ This exposure as well as the economic ingenuity of the Chinese saw their eventual rise from the status of labourers to that of business entrepreneurs,³⁷ which resulted in Chinese domination in skilled employment,

³¹ It should be noted that the minority groups in the United States extend beyond Blacks/African Americans and include for example Hispanics and women (Sowell (33) 34). The scope of this paper will be limited to a discussion of empowerment of Blacks.

³² These are statistics as documented in 2004. (Sowell, T *Affirmative Action Around the World: An Empirical Study* 56.)

³³ Sowell, T *Affirmative Action Around the World: An Empirical Study* 55.

³⁴ Sowell (n 33) 58.

³⁵ Sowell (n 33) 56.

³⁶ Sowell (n 33) 56.

³⁷ Sowell (n 33) 57.

leaving the Malays in the impoverished recesses of unskilled work.³⁸ There was thus a dire need to remedy these economic imbalances and as a result the New Economic Policy (NEP) was launched in 1970.³⁹ To circumvent any possible resistance to this policy, a multitude of government strategies were instituted to limit free speech primarily by prohibiting public questioning of governmental policies.⁴⁰

2.1.2 The New Economic Policy (NEP) 1970-1990

The NEP had two main objectives - firstly to reduce the 49% proportion of Malaysian population living below the poverty line to 16% by 1990, and secondly to remedy economic inequality.⁴¹ These goals were to be achieved by a redistribution of income to the Bumiputera in particular (who were the poorest of the population)⁴² and generally improving the economic status of this group.⁴³ A number of strategies were pursued on many levels to bring these goals to fruition, for example increased state intervention saw several government institutions formed to advance Malay-owned businesses.⁴⁴ Furthermore, government loans were issued to extend preferential credit to the indigenous people,⁴⁵ with these groups also enjoying employment preferences as well as the chance to acquire equity at below par value.⁴⁶

³⁸ Manning 'Affirmative Action in Malaysia between 1970 and 1990: how successful was it, and what are the lessons for South Africa?' (1993) *Friedrich Ebert Stiftung: Issues in Development, No. 1* 4.

³⁹ Sowell (n 33) 60. See also Manning (n 38) 4. What distinguishes the Malaysian Empowerment experience is that unlike the empowerment programmes in South Africa and the United States, it was not born out of historical racial marginalization. Instead the NEP, under the guise of pursuing racial equalization, was really an attempt to rectify 'embarrassing ethnic imbalances' in the economy. (Sowell (n 33) 63).

⁴⁰ Galenson *Labour and Economic Growth in Five Asian Countries: South Korea, Malaysia, Taiwan, Thailand, and the Phillipines* 18. See also Sowell (n 33) 60.

⁴¹ Manning (n 38) 4. The economic imbalances related to 'imbalances in income, in employment, and in ownership and control of wealth'. (Snodgrass *Inequality and Economic Development in Malaysia* 66 and 59-60).

⁴² Manning (n 38) 4.

⁴³ This would be done primarily by 'increasing the numbers of Bumiputera in professional occupations' and improving the 2% Malay corporate equity holdings by 1990. (Manning (n 38) 5).

⁴⁴ Jomo *Growth and Structural Change in the Malaysian Economy* 155. Such institutions included the Bumiputera Assistance Unit in the Malaysian Industrial Development Finance (MIDF) and the Credit Guarantee Corporation.

⁴⁵ Sowell (n 33) 62.

⁴⁶ Sowell (n 33) 61.

2.1.3 Evaluation of the Preference Policy

The Malaysian empowerment programme is one of the most successful in the world.⁴⁷ This is evidenced by the relative progress of the targeted group.⁴⁸ As regards the success of the NEP's first objective (poverty reduction), the level of poverty among the Bumiputera had been reduced from 64.8% in 1970 to 23.8% by 1987.⁴⁹ With regard to the second objective of restructuring the economic society and employment, success is apparent in that 21% (of the targeted 30%) of corporate stock had been transferred to the Malays by 1995,⁵⁰ which served to nurture the creation of a Bumiputera middleclass.⁵¹ The shortcoming however, was that the majority of the intended beneficiary groups were confined to low skilled, low paying jobs.⁵²

These successes, laudable as they are, were not achieved without a price. The stifling of free speech as a result of oppressive laws and the shortage of technically trained labour resulting from the systematic exclusion of the groups historically seen to have excelled,⁵³ are but a few of the negative consequences. Nevertheless viewed holistically, the NEP was successful, and its effectiveness was largely attributable to the economic growth prevalent in Malaysia during the time of its implementation. It is evident that economic growth is a key ingredient in ensuring the success of BEE.⁵⁴

⁴⁷Emsley *The Malaysian Experience Of Affirmative Action: Lessons for South Africa* 7. See also Sowell (n 35) 75.

⁴⁸Sowell (n 33) 75.

⁴⁹Manning (n 38) 24.

⁵⁰Sowell (n 33) 61. The problem, however, was that such transfers were biased in favour of the elites.

⁵¹Manning (n 38) 24.

⁵²Manning (n 38) 24.

⁵³Sowell (n 33) 75.

⁵⁴Emsley (n 47) 7. Important aspects that facilitate such growth are economic stability, and poverty alleviation through government intervention. (Emsley (n 47) 8-9.)

2.2 EMPOWERMENT IN THE UNITED STATES OF AMERICA

2.2.1 A History of Segregation: Economic Disempowerment of a Minority

In the US, Blacks make up a mere 12% of the population.⁵⁵ Similar to the SA situation, the need to pursue an economic empowerment strategy was born out of a history of segregation.⁵⁶ Blacks were largely excluded from the mainstream economy⁵⁷ as a result of 'job discrimination'.⁵⁸ They were also denied financial credit, prejudiced in the ownership of businesses and marginalised in the procurement of government contracts.⁵⁹

2.2.2 Economic Empowerment

Although the government provides loans and grants,⁶⁰ the primary empowerment mechanism employed, at both federal and state level, has been preferential procurement policies structured in favour of minority groupings.⁶¹ Such preferences manifest as 'set asides',⁶² 'bid price preferences',⁶³ and 'goals programmes',⁶⁴ and advancement through these

⁵⁵ Sowell (n 33) 116. The scope of this paper will be limited to the empowerment of African Americans/Blacks. It should be noted however that 'affirmative action programs have expanded over the years to include not only other racial or ethnic groups, but also women, so that such policies now apply to a [fair proportion] of the American population'. (Sowell (n 33) 116.)

⁵⁶ Encarta Encyclopaedia 'The United States of America', Microsoft ® Encarta ® Online Encyclopaedia 2005 <http://Encarta.msn.com> © 1997-2005 Microsoft Corporation. (Accessed on 30/07/2005).

⁵⁷ Weaver 'The Impact of Ethnicity upon Urban America' in Liebman (ed) *Ethnic Relations in America* 72.

⁵⁸ Weaver (n 57) 71.

⁵⁹ Lewis 'Women's History: Affirmative Action Review' Part 9 (2003):

http://womenhistory.about.com/library/etext/gov/bl_gov_aa_09.htm. (Accessed on 06/09/2005). The general problems hindering minorities were reiterated in the decision of *Fullilove v Klutznick*, 448 U.S. 448 (1979) 'The Chief Justice summarised the congressional findings regarding the difficulties confronting minority businesses as "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate track record, lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, pre-selection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavour minority businesses"' at 467.

⁶⁰ Sharp 'Minority-owned businesses' available at <http://www.referenceforbusiness.com/encyclopedia/Man-Mix/Minority-Owned-Businesses.html> (Accessed on 20/06/2006).

⁶¹ Lewis (n 59).

⁶² Also termed 'sheltered markets' are where 'only targeted groups can compete for government contracts'. (Sweet 'Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation' (2006) Vol 33 No. 1 *Journal of Law and Society* 162).

⁶³ In terms of Bid Price Preferences, SDB's are afforded a 10% bid preference. (Lewis (n 59).

⁶⁴ With 'goal programmes' the government attempts to contract with minority-owned businesses without using set-asides or bid enhancements-most often requiring prime contractors to make good faith efforts in subcontracting with [minority owned businesses]'. (Sweet, M 'Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation' (2006) Vol 33 No. 1 *Journal of Law and Society* 162).

mechanisms has been buttressed by executive orders and judicial decisions generally decided in favour of minority empowerment.⁶⁵

2.2.3 Evaluation of the Preference Policy

The procurement preferences have been relatively successful in empowering minority businesses.⁶⁶ The 5% participation target was reached at state level by 1993, and contracts to minority firms accounted for 6.4% of the overall dollar value.⁶⁷ Furthermore, between 1982 and 1991, there was a 24% increase of all 'federal procurement contracts' in excess of USD 25 000⁶⁸ with similar trends apparent at state level.⁶⁹ This statistical evidence is, however, undermined by the realities on the ground that indicate a general inability of beneficiaries to cope with the contracts that they are awarded, thereby affecting the sustainability of minority enterprises.⁷⁰ Another insidious weakness is evidenced by the programme's failure to realise its subsidiary objective of unemployment reduction.⁷¹ Due to these conflicting indicators, it is difficult to make a final evaluation of the US empowerment endeavour. What is clear however, is that the US initiative has often been viewed with a jaundiced eye.⁷²

In light of this historical and international context, this essay will now turn to focus on the nature of the SA Empowerment programme: Black Economic Empowerment.

⁶⁵ For example see, Executive Order 11246 of 1965, the Philadelphia Order of 1969; *Fullilove v Klutznick*, 448 U.S. 448 (1979); *United States v Paradise* 48 US 149 (1987) and *Grutter v Bolinger* 539 US 306 (2003) as cited in Brunner 'Timeline of Affirmative Action Milestones': <http://www.infoplease.com/spot/affirmativetimeline1.html> (Accessed 30/07/05).

⁶⁶ Lewis (n 59).

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ 'Agency-level data show that for example between 1985 and 1994, contracting with SDB's grew from 2.1% of Department of Defence procurement to 5.5%, an increase of more than 3 billion'. (Lewis (n 59))

⁷⁰ Bates et al cited in Chay and Fairlie 'Minority business set-asides and black self-employment' (1998) at p 6 at <http://econ.ucsc.edu/~fairlie/papers/setaside.pdf#search=%22preferential%20procurement%20the%20USA%20for%20minorities%22> (Accessed on 21/06/2006) as cited in Safi 'How Broad is Broad-Based Black Economic Empowerment: A critical Analysis of the Challenges facing BEE' Unpublished LLB Mini-Dissertation, University of Cape Town (2006) at 10. Also see Sweet 'Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation' (2006) Vol 33 No. 1 *Journal of Law and Society* 169.

⁷¹ Sweet, M 'Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation' (2006) Vol 33 No. 1 *Journal of Law and Society* 180.

⁷² Sweet (n 71) 180.

3. BLACK ECONOMIC EMPOWERMENT

3.1 BEE: A REITERATION

As highlighted above, BEE is necessary to remedy the economic imbalances perpetuated during *Apartheid*. At the introduction of democracy,⁷³ discussions were held as to the best strategy to pursue BEE.⁷⁴ After 1995, these discussions resulted in active involvement by the public and private sectors through which multiple initiatives sought to spread economic power within the Black population.⁷⁵ By 1997, the Black Management Forum (BMF) perceived that BEE was not going well,⁷⁶ and the independent BEE Commission (BEECom) was consequently established in 1998⁷⁷ to ascertain the challenges hindering significant Black participation and propose a viable BEE strategy.⁷⁸ The BEECom subsequently released a comprehensive report on BEE in 2000⁷⁹ prescribing an Integrated National BEE Strategy as a solution to the BEE complexities,⁸⁰ and recommended that national legislation be enacted to facilitate empowerment.⁸¹ This recommendation culminated in the enactment of the Broad Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act) to be analysed below.

As it stands, BEE is a process aimed at strategically transforming the SA economy⁸² by, *inter alia*, spreading equity holdings to incorporate previously disadvantaged South

⁷³ The first democratic elections were held in 1994.

⁷⁴ Osode (n 3) 108.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ http://www.southafrica.info/pls/procs/iac.page?p_t1=692&p_t2=3185&p_t (Accessed on 14/04/05).

⁸⁰ Osode (n 3) 109.

⁸¹ The Act would be 'specifically aimed at the achievement of four goals: i) [the provision] of an unambiguous definition of BEE...; ii) [the provision] of uniform guidelines... against which the public and private sectors could measure their [BEE] performance..., iii) [the provision] of procurement targets of public sector departments[and lastly, the setting out of a requirement that] all government departments submit an annual BEE report. (Osode (n 3) 109.

⁸² Woolley 'Everyone's Guide to Black Economic Empowerment and how to implement it' (2005) *Financial Mail* 12 & 31.

Africans,⁸³ re-organising management structures,⁸⁴ and ensuring greater participation of the majority in the economy in order to ensure 'economic justice'.⁸⁵

BEE is governed by several instruments and this paper will now turn to provide an overview of the BEE regulatory framework.

⁸³ BEE as defined by Old Mutual extracted from Kennedy 'Black Economic Empowerment in the South African Business Community: A Beginning of Economic Empowerment of Black South Africans' (1997) *MBA Thesis: Graduate School of Business University of Cape Town* 61.

⁸⁴ <http://www.busrep.co.za/index.php?fSectionId=553&fArticleID=2605708> (Accessed on 30/07/2005).

⁸⁵ Osode (n 3) 107.

4. THE BEE REGULATORY FRAMEWORK

This section of the paper will entail a critical discussion of the constitutional imperative, the BBEE Act,⁸⁶ The Codes of Good Practice (the Codes),⁸⁷ the Sector Transformation Charters (the Transformation Charters) and the BEE Strategy Document (the Strategy Document). As a precursor to this discussion a summary of the legal status of the instruments is in order. It is submitted that the regulatory instruments governing BEE rest in the following hierarchy, listed from most to least binding: The Constitution;⁸⁸ the BBEE Act;⁸⁹ the Codes; the Transformation Charters,⁹⁰ and finally the Strategy Document.

4.1 BEE: A CONSTITUTIONAL IMPERATIVE

BEE is a constitutional imperative, however the pursuit of BEE poses a paradox that stems from the framing of the right to equality.⁹¹ On the one hand s 9 (2) imposes an obligation on the state to undertake 'legislative and other measures to protect persons disadvantaged from unfair discrimination'.⁹² On the other hand, it has been argued that BEE

⁸⁶ Act 53 of 2003.

⁸⁷ Cliffe Dekker Attorneys uses 'the following format to describe individual statements in the Codes: C000S000 represents Code 000 Statement 000, and C100S100 represents Code 100 Statement 100' and so on. (Cliffe Dekker 'The Way to BEE' at http://bee.sabinet.co.za?CD_Way2BEE_guide.pdf (Accessed on 29/01/07).) I will adopt this same format in this paper.

⁸⁸ The Constitution of the Republic of South Africa, Act 108 of 1996.

⁸⁹ Act 53 of 2003.

⁹⁰ Van der Merwe for Werksmans Attorneys 'BEE and the Regulatory Environment' (2004) *Empowerment 2004 Black Ownership: Risk or Opportunity in Business Map Foundation* 32.

⁹¹ The right to equality is embodied in Section 9 of the Constitution. Section 9 provides:

'(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds listed in terms of sub section

(3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair'.

The right to equality has been dealt with extensively in the constitutional cases of *Harksen v Lane* NO 1998 (1) SA 300 (CC) and *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 60-1.

⁹² Section 9 (2) of The Constitution of the Republic of South Africa, Act 108 of 1996.

amounts to reverse racism⁹³ thus constituting a breach of s 9 (3) of the Constitution, which prohibits the state from unfairly discriminating against any person on the listed grounds of, *inter alia*, race and gender.⁹⁴ It is submitted that BEE *prima facie* amounts to unfair discrimination, but that it is seen as protection of the substantive right to equality⁹⁵ and is thus reasonable and justifiable in terms of s 36 of the Constitution.⁹⁶ In the Constitutional Court case of *Bato Star*,⁹⁷ Ngcobo J succinctly encapsulates the nature and implications of this constitutional imperative, stating that

...transformation is required by...the Constitution...and change sometimes comes at a cost...There are profound challenges facing our nation in meeting our constitutional commitment to transformation. The transformation process will inevitably have adverse effects on some individuals particularly those who have been advantaged...[but] these are some of the challenges we will have to confront as a nation in transition.⁹⁸

4.2 THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT ACT 53 OF 2003

The BBBEE Act⁹⁹ is legislation as envisaged by s 9(2) of the Constitution and is the primary regulatory instrument of BEE. The BBBEE Act¹⁰⁰ provides a skeletal framework for the programme in general - it not only defines BEE, but also enables the instruments that rest beneath it in the regulatory hierarchy and establishes the BEE Advisory Council. Although

⁹³ 'Mbeki Speaks out on BEE racism' at

http://www.skillsportal.co.za/black_economic_empowerment/415010.htm (Accessed on 14/04/05).

⁹⁴ Section 9 (3) of The Constitution of the Republic of South Africa, Act 108 of 1996.

⁹⁵ Formal equality requires 'the law to treat all individuals the same regardless of their actual social and economic circumstances', whereas substantive equality takes these circumstances into account. (De Waal et al *The Bill of Rights Handbook* 184.)

⁹⁶ Section 36 of the Constitution provides:

'(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and the its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or any other provision in the Constitution, no law may limit any right entrenched in the Bill of Rights'.

⁹⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 106.

⁹⁸ *Ibid.*

⁹⁹ Act 53 of 2003.

¹⁰⁰ *Ibid.*

the BBBEE Act¹⁰¹ is framed in broad terms this is, in general, unproblematic because it is supplemented by the detailed directives contained in the Codes. The BBBEE Act¹⁰² is relatively uncontroversial, however the definitions section deserves some attention.

The term ‘broad-based black economic empowerment’ is defined as ‘economic empowerment,...through a non-exhaustive list of diverse but integrated socio-economic strategies’.¹⁰³ It is submitted that the non-exhaustive list is compatible with the dynamism of BEE and the multi- dimensional socio-economic objective,¹⁰⁴ and affords government the leeway to adopt additional strategies not already enumerated in the Act.¹⁰⁵ This open-ended list provides flexibility and is a clear strength of the Act.¹⁰⁶

The beneficiaries of the Act¹⁰⁷ are ‘Black people’ defined as Africans, Coloureds and Indians.¹⁰⁸ This broad definition extends further to include ‘women, workers, youth, people with disabilities and people living in rural areas’.¹⁰⁹ It is clear that this definition specifically mentions groups ‘historically [susceptible] to disempowerment’¹¹⁰ and thus reflects the intention of the legislature to spread preferences beyond the ‘new Black elite’.¹¹¹ This definition has been qualified by C000S000,¹¹² which limits ‘Black people’ to natural persons who are ‘citizens of the Republic of South Africa by birth or descent...or by naturalisation before the [commencement of the Interim Constitution in 1993]’¹¹³ or who, were it not for

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ Section 1 of the BBBEE Act 53 of 2003 and Osode (n 3) 110. S 1 provides that ‘These strategies include but are not limited to –

- (a) increasing the number of black people that manage, own and control enterprises and productive assets;
- (b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;
- (c) human resources and skills development;
- (d) achieving equitable representation in all occupational categories and levels in the workforce;
- (e) preferential procurement; and
- (f) investment in enterprises that are owned or managed by black people’.

¹⁰⁴ Osode (n 3) 111.

¹⁰⁵ Osode (n 3) 111.

¹⁰⁶ Act 53 of 2003.

¹⁰⁷ *Ibid.*

¹⁰⁸ Section 1 of the BBBEE Act 53 of 2003 and Osode (n 3) 112.

¹⁰⁹ *Ibid.*

¹¹⁰ Osode (n 3) 112.

¹¹¹ Osode (n 3) 111.

¹¹² C000S000 of 2005 : Department of Trade and Industry (Phase One 2005 Codes) Code 000 ‘Framework for the Measurement of Broad-Based Black Economic Empowerment : Statement 000 ‘The Organisation of the Codes of Good Practice, The Elements of Broad Based Black Economic Empowerment’ at www.dti.gov.za (Accessed on 29/01/07).

¹¹³ C000S000 of 2005 (n 112) para 1.3.1 and para 1.3.2.

the pre-1993 Apartheid regulations, would have been entitled to be naturalised prior to the commencement of the Interim Constitution, but only acquired citizenship after its enactment.¹¹⁴ This supplementation of the definition by C000S000¹¹⁵ serves to counter previous arguments that the BBEE Act¹¹⁶ failed to limit the scope of BEE to victims of Apartheid, and also serves to illustrate the manner in which the Codes flesh out the space that the Act¹¹⁷ carves.

Two interesting issues arise from this definition of 'Black people'. First, under Apartheid people were classified as either Black, White, Coloured or Asian.¹¹⁸ Although the Asian group mostly constituted Indians,¹¹⁹ other races considered Asian,¹²⁰ for example Chinese people, are not covered by the Act.¹²¹ This is a clear oversight on the part of the legislature. The second issue relates to the mention of communities as qualified candidates of BEE. This is encouraging for those who support 'communitarianism',¹²² however, whether communities will realistically materialise as beneficiaries (especially in light of the present preoccupation of empowerment through equity transfer and management control)¹²³ will depend on how well the BEE custodians organise and support them.¹²⁴

Apart from these concerns, the BBEE Act¹²⁵ is a commendable piece of legislation, and many potential shortcomings are more than likely compensated for by the comprehensive Codes of Good Practice.

¹¹⁴ C000S000 of 2005 (n 112) para 1.3.3.

¹¹⁵ C000S000 of 2005 (n 112).

¹¹⁶ Act 53 of 2003.

¹¹⁷ *Ibid.*

¹¹⁸ 'History of Apartheid in South Africa' at http://en.wikipedia.org/wiki/Apartheid#Colour_classification (Accessed on 04/02/07).

¹¹⁹ *Ibid.*

¹²⁰ For example the 'Chinese were classified [under *Apartheid*] as either non-European or non-white'. Danwei 'Chinese Fight to be Black' http://www.danwei.org/china_and_africa/chinese_fight_to_be_black.php (Accessed on 05/02/07).

¹²¹ Act 53 of 2003.

¹²² Osode (n 3) 111.

¹²³ Balshaw et al *Cracking Broad-Based Black Economic Empowerment: Codes and Scorecard unpacked* 76.

¹²⁴ Osode (n 3) 111.

¹²⁵ Act 53 of 2003.

4.3 THE CODES OF GOOD PRACTICE¹²⁶

Section 9 of the Act¹²⁷ empowers the Minister of Trade and Industry to issue Codes of Good Practice on BEE.¹²⁸ In issuing these Codes the Minister must take into account a strategy issued in terms of s 11¹²⁹ which ‘may specify targets consistent with objectives of the Act as well as the period within which those targets must be achieved’.¹³⁰ In terms of s 9, the procedure for the issuance of the Codes entails the publication of a draft code for public comment in the Gazette, with a 60 day provision for interested persons to submit their input on the content of the draft.¹³¹

In substantial compliance with the above procedure, the first phase of the Codes were tabled and released for public comment by the Department of Trade and Industry (DTI) in December 2004 (The Phase One 2004 Codes).¹³² The final draft of phase one was released in November 2005 (The Phase One 2005 Codes).¹³³ Drafting of the second phase of the Codes commenced in April 2005, and the final draft was released in December 2005 (The Phase Two 2005 Codes).¹³⁴ Both phases have since been approved by Cabinet and, at time of writing, it was projected that both sets of Codes would be gazetted early 2007 which will render them official.¹³⁵

Before the Codes were instituted, the Strategy Document¹³⁶ and several Transformation Charters¹³⁷ governed BEE, but these instruments fell short in several respects.¹³⁸ The Strategy did not provide practical guidelines for implementation, and disparities between the Transformation Charters in relation to definitions, standards, and

¹²⁶ These will be referred to as the Codes.

¹²⁷ Act 53 of 2003

¹²⁸ Section 9 (1) of Act 53 of 2003 provides: ‘In order to promote the purposes of the Act, the Minister may by notice in the Gazette issue codes of good practice on black economic empowerment...’.

¹²⁹ S 9 (2) of the BBBEE Act 53 of 2003.

¹³⁰ S 9 (3) of the BBBEE Act 53 of 2003. Phraseology extracted from (Osode (n 3) 114.

¹³¹ S 9 of the BBBEE Act 53 of 2003.

¹³² The Department of Trade and Industry ‘The Codes of Good Practice on Black Economic Empowerment – Phase One: A Guide to interpreting the First Phase of the Codes’ (2005) p 5 at http://www.dti.gov.za/bee/Chapterone_1_11.pdf (accessed on 26/06/2006). This will be referred to as The DTI Guide to Interpretation from hereon in.

¹³³ The DTI Guide to Interpretation (n 132) 5.

¹³⁴ ‘Black Economic Empowerment: Regulatory Article’ (15 Feb 2006) at http://bee.sabinet.co.za/bee_regulatory_article2.html (Accessed on 05/02/07).

¹³⁵ ‘Cabinet gives green light to Codes of Good Practice’ 7 December 2006 at <http://www.gov.za/article/articleview.asp?current+1&arttypeid=1&artid=1350> (Accessed on 19/12/06).

¹³⁶ Discussed in para 4.5 below.

¹³⁷ Discussed in para 4.4 below.

¹³⁸ The DTI Guide to Interpretation (n 132) 2.

targets in the implementation of BEE resulted in disparate progress,¹³⁹ BEE deals falling short of the empowerment standard,¹⁴⁰ and leeway for entities to evade the requirements of the BBBEE Act.¹⁴¹ In an endeavour to counteract these systemic difficulties, the BBBEE Act¹⁴² was enacted in 2004. Although the Act¹⁴³ provided some clarity, it is couched in broad terms and thus did not serve in itself to remedy the lack of specificity in the framework. The Codes seek to address these shortcomings and intend to standardise the definition of ‘broad-based BEE’ as well as to benchmark measurement principles in the interests of clarity and certainty.¹⁴⁴ They are an endeavour to provide uniform regulations and indicators for empowerment transactions concluded in every sector,¹⁴⁵ and ensure that companies not accounted for by the Charters are included in the purview of empowerment.¹⁴⁶ An additional objective of the Codes is the institution of structures that facilitate the implementation and appraisal of the initiative. In this vein, the Codes make provision for the institution of verification and accreditation agencies that are intended to facilitate, standardise, and validate BEE transactions.¹⁴⁷ In a nutshell the Codes were designed to ensure ‘real empowerment’¹⁴⁸ by giving content to the regulatory framework and unifying the system.

¹³⁹ The DTI Guide to Interpretation (n 132)3.

¹⁴⁰ Singh & Jekwa et al ‘Cracking the Codes’(2005) *Financial Mail* April 15 at 19.

¹⁴¹ The DTI Guide to Interpretation (n 132) 3.

¹⁴² Act 53 of 2003.

¹⁴³ *Ibid.*

¹⁴⁴ The DTI Guide to Interpretation (n 132) 3.

¹⁴⁵ Singh (n 140) 19.

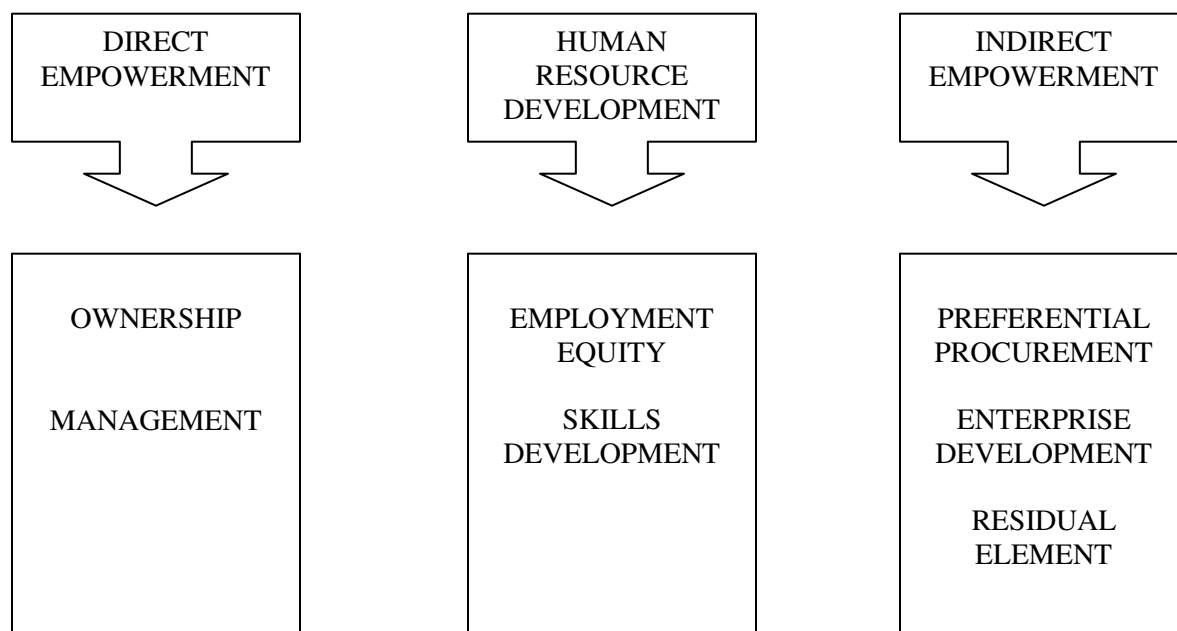
¹⁴⁶ *Ibid*

¹⁴⁷ The DTI Guide to Interpretation (n 132) 3. Verification and Accreditation Agencies are discussed in para 4.3.4 below.

¹⁴⁸ Singh (n 140) 19. Real empowerment means that beneficiaries should be able to service their debt and thus take ownership of shares allocated to them. (Singh (n 140) 19).

4.3.1. The Structure and Content of the Codes

There are three core components and seven sub-elements of BBBEE. These are reflected diagrammatically below.¹⁴⁹



The first component is that of ‘Direct Empowerment’, which comprises the ‘Ownership’ and ‘Management’ elements; secondly, the ‘Human Resource Development’ component, which comprises the ‘Employment Equity’ and ‘Skills Development’ elements; and lastly ‘Indirect Empowerment’, which comprises the ‘Preferential Procurement’, ‘Enterprise Development’ and ‘Residual’ elements.¹⁵⁰ The overall structure of the codes is based on these categories, with phase 1 containing the ‘Direct Empowerment’ component, and phase 2 detailing the ‘Human Resource Development, and ‘Indirect Empowerment’ ones.¹⁵¹ Charts detailing the specifics of the Codes are attached as APPENDIX 1.¹⁵²

¹⁴⁹ Balshaw (n 123) 76.

¹⁵⁰ C000S000 of 2004: Department of Trade and Industry (Phase One 2004 Codes): Code 000 ‘BBBEE Framework’: Statement 000 Principles and Definitions of BBBEE at paras 41-55 at www.dti.gov.za (Accessed on 19/12/06). Also see Balshaw (n 123) 75-76. As a matter of interest, the residual element includes Corporate Social Development.

¹⁵¹ The DTI Guide to Interpretation (n 132) 6.

¹⁵² It should be noted that separate Codes apply to Qualifying Small Enterprises. A discussion of these Codes falls outside the ambit of this paper. However, in the interests of providing a holistic picture, a chart depicting these Codes is reflected in APPENDIX 2.

4.3.2 The Binding Nature of the Codes of Good Practice

Section 10 of the BBBEE Act¹⁵³ states that ‘Every organ of state and public entity *must*¹⁵⁴ take into account and, as far as is reasonably possible, apply any relevant Code of Good Practice issued in terms of [the] Act’.¹⁵⁵ The use of the word *must* indicates the mandatory obligation on the state and public entities to comply with the Codes when determining licences, concessions, procurement policies,¹⁵⁶ ‘the sale of state owned enterprises’,¹⁵⁷ and ‘the entering into partnerships with the private sector’.¹⁵⁸ However, the BBBEE Act¹⁵⁹ is silent on the obligation of private enterprises to comply with the Codes. In order for the Codes to be implemented it is crucial that state and private entities interact and collaborate. Despite the importance of such co-operation, the Codes oddly only bind public entities. This unilateral binding nature of the Codes renders them *sui generis* and this paper will now turn to investigate their precise legal nature.

The point of departure in determining the legal nature of the Codes will be to investigate the characteristics of the instruments. The Codes are regulatory instruments envisaged by the BBBEE Act,¹⁶⁰ and are issued by the Minister in the gazette. Power has thus been delegated to the Minister by the legislature for their issuance and on this score the Codes meet the definition of the recent phenomenon termed ‘delegated legislation’.¹⁶¹ The purpose behind delegated legislation is to enable effective implementation of primary legislation, which is usually phrased in broad terms. In light of this, it appears that the Codes may be classified as delegated legislation.

¹⁵³ Act 53 of 2003.

¹⁵⁴ My emphasis.

¹⁵⁵ Section 10 of the BBBEE Act 53 of 2003 provides: ‘Every organ of state and public entity must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of this Act in-

(a) determining qualification criteria for the issuing of licences, concessions or other authorisations in terms of any law;

(b) developing and implementing a preferential procurement policy;

(c) determining qualification criteria for the sale of state owned enterprises; and

(d) developing criteria for entering into partnerships with the private sector’.

¹⁵⁶ Section 10 (a) and (b) of the BBBEE Act 53 of 2003

¹⁵⁷ Section 10 (c) of the BBBEE Act of 53 of 2003.

¹⁵⁸ Section 10 (d) of the BBBEE Act 53 of 2003.

¹⁵⁹ Act 53 of 2003.

¹⁶⁰ *Ibid.*

¹⁶¹ Hofman, J Chapter 2 ‘Legislators and legislation’ in a forthcoming work *Interpreting legislation in South Africa* to be published by Ampersand Press in 2007 at 25 – 26. ‘The Constitution refers to delegate legislation as “subordinate legislation” or “laws made in terms of an Act of Parliament or provincial Act”’. (Hofman (n 161) 26).

This conclusion may be doubtful however, when one considers the fact that delegated legislation usually takes the form of regulations or proclamations.¹⁶² Furthermore, s14 of the Act¹⁶³ makes specific provision for the Minister to make regulations to ensure proper implementation of the Act. It is unlikely that the legislature would have made separate provision for the same species of instrument to regulate similar issues. This would be an unwarranted duplication unnecessarily adding to the complexity of the already labyrinthine regulatory framework. The duplication may perhaps be seen as legislative over provision inserted *ex abundanti cautela*,¹⁶⁴ however this conclusion is debatable. It is submitted that the Codes do, in so far as they relate to state entities, amount to delegated legislation as they fulfil the *essentialia* of delegated legislation. This submission is fortified by the fact that delegated legislation may exist in forms other than regulations or proclamations, the ultimate determination of delegated legislation being one of substance and not form.¹⁶⁵ This paper argues that the rationale for the provision of two ‘subordinate’ instruments of the same species is to add greater flexibility to the regulatory regime. Although s 9 (1) and s 9 (3) of the Act¹⁶⁶ list factors that *may*¹⁶⁷ be included in the Codes, they are in fact limited in their mandatory application to state entities.¹⁶⁸ It is submitted that the provision in the Act¹⁶⁹ for the enactment of regulations over and above the Codes affords the Minister leeway not only to expound on issues that may amplify the efficacy of the framework, but more pertinently, to cater for the enactment of rules that may be binding on the private sector.

¹⁶² Hofman (n 161) 27.

¹⁶³ Section 14 of the BBBEE Act 53 of 2003 provides: ‘The Minister may make regulations with regard to any matter that it is necessary to prescribe in order to ensure the proper implementation of this Act’.

¹⁶⁴ *Navidas (Pty) Ltd v Essop; Metha v Essop* 1994 (4) SA 141 (A).

¹⁶⁵ Hofman (n 161) 27.

¹⁶⁶ Section 9 (1) of Act 53 of 2003 provides: ‘In order to promote the purposes of the Act, the Minister may by notice in the Gazette issue codes of good practice on black economic empowerment that may include-

- (a) the further interpretation and definition of broad-based black economic empowerment and the interpretation and definition of different categories of black economic empowerment entities;
- (b) qualification criteria for preferential purposes for procurement and other economic activities;
- (c) indicators to measure broad-based economic empowerment;
- (d) the weighting to be attached to broad-based black economic empowerment indicators referred to in paragraph (c);
- (e) guidelines for stakeholders in the relevant sectors of the economy to draw up transformation charters for their sector; and
- (f) any other matters necessary to achieve the objectives of this Act’.

Section 9 (3) of Act 53 of 2003 provides: ‘A Code of Good Practice issued in terms of subsection (1) may specify-

- (a) targets consistent with the objectives of this Act; and
- (b) the period within which those targets must be achieved’.

¹⁶⁷ Discretion is indicated by use of the word *may*.

¹⁶⁸ Section 10 of the BBBEE Act 53 of 2003.

¹⁶⁹ Act 53 of 2003.

The status of the Codes as they relate to the private sector is ambiguous because the Act¹⁷⁰ is silent on the obligation of private entities to comply with them. According to the rules of statutory interpretation the starting point is that the ambit of the Act is restricted to that which is expressly stated.¹⁷¹ Thus the Act's failure to mention private entities in s 10 points to the fact that the Codes are not legally binding on them. However, provisions may sometimes be implied if the three stage 'implied provision test' is discharged. This test requires first, that the implied provision must be *necessary* and not merely convenient,¹⁷² secondly, that the provision must be *necessary to make the legislation effective*,¹⁷³ and lastly, that the provision must be *capable of clear and precise formulation*.¹⁷⁴ *In casu*, the last requirement appears unproblematic. The first two requirements are also met if one views the private sector as so integral to the implementation of BEE that without its compulsory inclusion, BEE would be unworkable. If this is accepted, then private entities are included within the ambit of s 10 by implication. This proposition is also reinforced by the fact that BEE is a constitutional imperative requiring joint effort between public and private sectors to bring it to fruition. On this basis, it may be suggested that the Codes are legally binding on the private sector.

However, in light of the constitutional doctrine of separation of powers,¹⁷⁵ the implied provision test is not easily discharged. Furthermore, a trite canon of interpretation states that unless the interpretation of a provision leads to incongruity or absurdity, the express statutory meaning prevails.¹⁷⁶ The omission of private entities from the section cannot be viewed as absurd (notwithstanding the integral participation required by the private sector for the effective implementation of BEE) if one looks to the proposed intention of the legislature in

¹⁷⁰ *Ibid.*

¹⁷¹ Refer in general to s 1 (c) of the Constitution on the Rule of Law. Also see *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (1) SA 997 (C).

¹⁷² *Lekhari v Johannesburg City Council* 1956 (1) SA 552 (A).

¹⁷³ *Taj Properties (Pty) Ltd v Bobat* 1952 (1) 723 (N) at 729 Holmes AJ 'Thus in the case of statutes, there is a necessary implication only if effect cannot be given to the statute as it stands unless the provision sought to be implied is read into the statute'.

¹⁷⁴ *The Firs Investments (Pty.) Ltd v Johannesburg City Council* 1967 (3) SA 549 (W) at 577.

¹⁷⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 46 per O'Regan J. Inherent in the doctrine of separation of powers is the respect that the judiciary needs to show for the other arms of government.

¹⁷⁶ *Canca v Mount Frere Municipality* 1984 (2) SA 830 (TK) 832 F-G [approved in *Hoban v Absa Bank Ltd t/a United Bank and Others* 1999 (2) SA 1036 (SCA) at 1044]. Also see *Namibian Minerals Corp Ltd v Benguela Concessions Ltd* 1997 (2) SA 548 (A) at 566.

omitting them. The intention is to respect the economic realm of free enterprise, which is necessary for the nurturing of entrepreneurial spirit as well as for economic growth.¹⁷⁷ To impose a mandatory obligation on private industry would stifle competition through the dictation of resource usage, and would result in an unsustainable (and unfeasible) empowerment endeavour.¹⁷⁸

Ultimately the implementation of BEE is a strategic business decision¹⁷⁹ made with the awareness of resource capacity, growth potential, market forces and, most importantly, survival imperatives. It should be noted however, that should private entities *choose* to embark on BEE strategies, the regulatory guidelines contained in the Codes become applicable.¹⁸⁰

This begs the question - what then is the legal nature of the Codes as viewed from the private sector perspective? In investigating this issue, this paper will look at other instruments that are termed 'codes' to ascertain whether the status attributable to these instruments may be instructive in determining the legal nature of the BEE Codes.¹⁸¹

The first set of 'codes' to be considered is the Security Regulation Code on Takeovers and Mergers (SRC).¹⁸² The Securities Regulation Panel established in terms of s 440 B of the Companies Act¹⁸³ is responsible for the issue of the SRC. The SRC provides an 'orderly framework'¹⁸⁴ of rules and guidelines for takeover and merger activities and applies to all listed companies and to all persons involved in such transactions.¹⁸⁵ It aims to ensure

¹⁷⁷ Balshaw (n 123) 33.

¹⁷⁸ As an aside, even if the legislature had intended for the private sector to be bound by the Codes, it is unlikely that they would have failed to mention this if one looks at the detail and contingencies provided for in the Act that point to a thoroughly considered piece of legislation.

¹⁷⁹ Balshaw (n 123)18.

¹⁸⁰ C000S000 of 2005 (n 112) para 3.

¹⁸¹ It should be noted that the originating source of these codes may not be a Minister of the executive as in the case of the BEE Codes. The value of the comparative analysis lies in ascertaining the highest common substance shared by instruments termed 'codes'.

¹⁸² Subsidiary Legislation of The Companies Act No. 61 of 1973 'The Securities Regulation Code on Take-Over and Mergers Explanatory Notes' in Strydom EML (Ed). *Company Legislation Handbook 2007* 356.

¹⁸³ The Companies Act No 61 of 1973.

¹⁸⁴ Section 1 'Nature and Purpose of the Code': the Securities Regulation Code on Take-Over and Mergers (n 182) 356.

¹⁸⁵ Section 1 'Code Responsibilities': the Securities and Regulation Code on Take-Over and Mergers: (n 182) 357.

fairness and equality between all security holders¹⁸⁶ and expressly provides that it ‘enjoys the force of law’.¹⁸⁷

An investigation of the King Code II¹⁸⁸ reveals that it constitutes a ‘set of principles [that] does not purport to determine the detailed course of conduct of directors on any particular matter’,¹⁸⁹ but merely to guide companies in determining the ‘best available practice’¹⁹⁰ when considering other regulatory instruments which apply to them.¹⁹¹ The King Code II applies to what are termed ‘affected companies’¹⁹² and all such companies are urged to duly consider the King Code insofar as its principles are relevant.¹⁹³

Schedule 8 (the Labour Code) issued in terms of the Labour Relations Act (LRA)¹⁹⁴ is another useful comparator. The Definitions section of the LRA¹⁹⁵ expressly excludes Schedule 8 as being a part of the ‘Act’ as defined.¹⁹⁶ The inference that can be drawn is that

¹⁸⁶ Section 1 ‘Nature and Purpose of the Code: The Securities Regulation Code on Take-Overs and Mergers (n 182) 356.

¹⁸⁷ Section 1 ‘Enforcement of the Code’: The Securities Regulation Code on Take-Overs and Mergers (n 182) 357. This is in contrast to the City Code (upon which the SRC is modelled) which is not legally binding. The City Code on Take over and Mergers is issued by the London Panel on Take-overs and Mergers. (Blackman et al *Commentary on the Companies Act* 15A-153).

¹⁸⁸ King Committee on Good Corporate Governance, ‘King Report on Corporate Governance 2002 (King II)’.

¹⁸⁹ King Committee on Good Corporate Governance (n 188) at Para 1 sub-para 1.5.

¹⁹⁰ King Committee on Good Corporate Governance (n 188) at Para 1 sub-para 1.5.

¹⁹¹ For example, ‘statutes, regulations, and other authoritative directives regulating their conduct and operation’ (King Committee on Good Corporate Governance (n 188) at Para 1 sub-para 1.5)

¹⁹² King Committee on Good Corporate Governance (n 188) at para 1:

‘1. Application of Code

1.1 The Code applies to the following enterprises (hereinafter referred to as ‘affected companies’):

1.1.1 All companies with securities listed on the JSE Securities Exchange in South Africa.

1.1.2 Banks, financial and insurance entities as defined in the various legislation regulating the South African financial services sector.

1.1.3 Public sector enterprises and agencies that fall under the Public Finance Management Act and the Local Government: Municipal Finance Management Bill (still to be promulgated) including any department of State or administration in the national, provincial or local sphere of government or any other functionary or institution:

- exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
- exercising a public power or performing a public function in terms of any legislation, but not including a Court or a judicial officer,

Unless otherwise prescribed by legislation.

1.2 All companies, in addition to those falling within the categories listed above should give due consideration to the application of this Code insofar as the principles are applicable...’.

¹⁹³ King Committee on Good Corporate Governance (n 188) at Para 1 sub-para 1.2.

¹⁹⁴ Labour Relations Act 66 of 1995, schedule 8: Code of Good Practice: Dismissal.

¹⁹⁵ Section 213 of the LRA Act 66 of 1995.

¹⁹⁶ Section 213 of the LRA Act 66 of 1995 provides ‘this Act’ includes the section numbers, the Schedules, except Schedules 4 and 8, and any regulations made in terms of section 208, but does not include the page headers, the headings or footnotes.

Schedule 8, in the absence of a clear articulation of its legal nature, may be regarded as a lower order instrument to those grouped together as forming part of the 'Act'. The Labour Code (aimed at promoting mutual respect in employer-employee relationships) outlines guidelines on dismissal issues in general terms¹⁹⁷ and expressly permits deviation from the norms contained therein.¹⁹⁸

What can be deduced from the above analysis is that the highest common factor of these 'codes' is that they are guidelines in the form of rules, principles or norms. What is also apparent is that in the absence of an express provision in the 'codes' attributing the binding force of law, the codes appear to be mere guidelines that buttress regulatory frameworks. They may thus be regarded as what is termed 'soft law'.¹⁹⁹ 'Soft' law is not law proper²⁰⁰ and thus is not enforceable in a court of law.²⁰¹ Soft law is made up of 'written instruments that are not intended to be legally binding,'²⁰² but that are so central to the legal regulatory framework²⁰³ that they cannot merely be discarded as 'non-law'.²⁰⁴ Figuratively speaking, '...there exists a considerable "grey area" of "soft law" between the white space of law and the black territory of non-law...the "grey area" may greatly affect the white one and..."soft law" can have legal effects'.²⁰⁵

This 'soft law' status of these 'codes' indisputably obtains to the BEE Codes (as they relate to the private sector). The BEE Codes do not expressly confer the force of law unto themselves, but do serve as non-binding guidelines for the implementation of BEE by the

¹⁹⁷ Section 1(1) Schedule 8, and s 1(3) of the LRA Act 66 of 1995.

¹⁹⁸ Section 1(1) of Schedule 8 of the LRA Act 66 of 1995.

¹⁹⁹ Soft Law is an international law notion connoting 'non-binding instruments or documents'. (Shaw, M *International Law* 110). Notwithstanding that this is a notion birthed from the international law arena, soft law has become accepted as a species of legal instrument in domestic law.

²⁰⁰ Shaw, M *International Law* 110-111.

²⁰¹ Harris, DJ *Cases and Materials on International Law* 62.

²⁰² Harris (n 201) 61.

²⁰³ Shaw (n 200) 110-111.

²⁰⁴ Hofman argues that 'strictly speaking there is no such thing as soft law'. (Hofman (n 161) 42.) This proposition is supported by Sztucki (in *Festkrift Hjernner* (1990) 550-551 as cited in Harris (n 201) 62 who states that 'Primo, the term is inadequate and misleading. There are no two levels or "species of law" – something is law or is not law. *Seundo*, the concept is counterproductive and even dangerous. On the one hand it creates illusory expectations of (perhaps even insistence on) compliance with what no one is obliged to comply; and on the other hand, it exposes binding legal norms for risks of neglect, and ...law as a whole for risks of erosion, by blurring the threshold between what is legally binding and what is not'. (cited in Harris (n 201) 550-551). Harris counter-argues convincingly that 'while it may be paradoxical and confusing to call something law when it is *not* law, the concept is nonetheless useful to describe instruments that clearly have an impact...and that may later harden into [law]...'. (Harris (n 201) 62).

²⁰⁵ Harris (n 201) 61. Soft Law is 'significant in signalling the evolution and establishment of guidelines which may ultimately be converted into legally binding rules'. Shaw (n 200) 111.

private sector. Furthermore, they are of such importance and influence to the BEE regulatory structure that they warrant special attention.²⁰⁶ It can thus be concluded that the legal status of the Codes (from the private sector perspective) is that of ‘soft law’.

In light of this conclusion, it is necessary to ascertain how the government has enforced these non-binding codes so as to regulate commerce and ensure compliance with BEE. It is to this end that this paper will now turn.

4.3.3 Implementation

4.3.3.1 The Mechanism

A BBBEE Scorecard has been issued by the Department of Trade and Industry (DTI) as a Code of Good practice.²⁰⁷ The Scorecard is intended to gauge progress made towards BEE by enterprises subject to the Codes. The Scorecard works on a weighted average, and allocates points to seven criteria: (i) Ownership (20 points); (ii) Management (10 points); (iii) Employment Equity (10 points); (iv) Skills development (20 points); (v) Preferential Procurement (20 points); (vi) Enterprise Development (10 points), and (vii) Residual element (10 points).²⁰⁸

In terms of s10 of the Act,²⁰⁹ every organ of state and public entity²¹⁰ is required to consider and apply this Code in: ‘determining the qualification criteria for the issuing of licences; concessions or other authorisations in terms of any law; developing and implementing a preferential procurement policy; determining the qualification criteria for the

²⁰⁶ Shaw (n 200)110-111.

²⁰⁷ C000S000 of 2005 (n 112) para 8.

²⁰⁸ *Ibid.*

²⁰⁹ Act 53 of 2003.

²¹⁰ Definitions Section of the BBBEE Act 53 of 2003 provides ‘Organ of state means

- (a) a national or provincial department as defined in the Public Finance Management Act, 1999 (Act No.1 of 1999);
- (b) a municipality as contemplated in the Constitution;
- (c) Parliament;
- (d) A provincial legislation; and
- (e) A constitutional institution listed in Schedule 1 to the Public Finance Management Act 1999 (Act No. 1 of 1999).

Public Entity means public entity listed in Schedule 2 or 3 to the Public Finance Management Act, 1999 (Act No. 1 of 1999’.

‘It is clear from these definitions that the government has included those government departments responsible for issuing licences, the Independent Communications Authority of South Africa (ICASA), the Development Bank of Southern Africa, the Industrial Development Corporation, the Accounting standards Board, the South African Tourism Board, the Medical Schemes Council, the Financial Services Board, and the National Electricity Regulatory’. Osode (n 3) 116.

sale of state owned enterprises and; developing criteria for entering into [public or private partnerships]’.²¹¹ It is submitted that a ‘carrot-stick’ approach has been adopted to ensure compliance with the Codes in that adherence to the BEE standards stipulated in the Codes enhances prospects of success in tenders for government patronage, in applications for licences, in authorisations for projects or in the granting of concessions.²¹² This is the same approach that was adopted in Malaysia to enforce the restructuring programme.²¹³

In instances where private entities do not transact directly with the state or with state entities, the ‘cascade effect’²¹⁴ pressurises private entities that transact *inter se* to comply with the Codes. This ‘cascade effect’ works as follows- enterprises that do transact directly with the state strive to attain the highest BEE score possible for reasons mentioned above. One of the ways to improve this score is by procuring goods and services from BEE compliant suppliers as this will count towards the procurer’s ‘preferential procurement’ score of the BEE Scorecard.²¹⁵ This process will replicate itself throughout the supply chains of most industries, that is to say it will ‘cascade’ downward.²¹⁶ Thus, in the interests of survival and competitive advantage, all suppliers at different tiers of the value chain will be pressured to become BEE compliant. Other factors that compel BEE compliance are for example, that banks are weary of extending credit to unempowered enterprises because such enterprises are prone to becoming bad debtors.²¹⁷ A further risk is that directors of non-compliant companies may be burdened with claims for damages instituted by the company for breach of both their fiduciary obligations and their duties of care and skill.²¹⁸ Compliance with the Codes is thus effected, notwithstanding the non-binding status of the Codes on private sector entities.

²¹¹ Section 10 (a) – (d) of the BBEE Act 53 of 2003 and Osode (n 3)115.

²¹² Osode (n 3)116.

²¹³ Sowell (n 33) 61.

²¹⁴ Balshaw (n 123) 25.

²¹⁵ Balshaw (n 123)19; 20 & 25.

²¹⁶ ‘An example of the cascade effect is DaimlerChrysler South Africa. They will not be fined or penalized directly for not implementing the Act through legislation. They do, however, do business with the government insofar as the sale of vehicles and trucks is concerned and further rely on government incentives for their exports. It is in this regard that when government deals with them, it applies the legislation to impose direct pressure on DaimlerChrysler South Africa to comply with the broad-based BEE regulations. Further down the supply chain a consultancy wanting to do business with DaimlerChrysler South Africa will be required to comply because Daimler Chrysler South Africa would like to score procurement points to contribute towards their broad-based score’. (Balshaw (n 123) 25-26.

²¹⁷ The operation of the ‘cascade effect’ will impact on the profitability of these non-compliant companies, making them high risk clients. (Daly ‘Black Economic Empowerment ‘ (May 2005) *Business Day Survey* 14 and Janisch *Keep in Step: Broad-Based BEE for Small Businesses* 62.)

²¹⁸ Janisch *Keep in Step: Broad-Based BEE for Small Businesses* 62.

4.3.4. Verification Agencies

As stated above, an enterprise will be rated and accorded a BEE status based on its overall weighted average score as determined by application of the BEE Scorecard. This rating is calculated by an accredited Verification Agency that will issue a valid Verification Certificate reflecting the BEE status of the measured entity.²¹⁹

Verification Agencies were established in response to the problems encountered in the early 1990's.²²⁰ During this period there were no standard measures to evaluate and compare different entities BEE progress,²²¹ however with the advent of Verification Agencies, a mechanism now exists to verify BEE contributions and to ascertain the accuracy of an entity's reported BEE status.²²² Despite this innovation, there is still the risk of disparate verification methodologies.²²³ To avert this danger, the Minister in collaboration with an Accreditation Body²²⁴ must 'accredit only those verification agencies which meet...[specified] criteria'²²⁵ ..., thereby ensuring that standards are uniform'.²²⁶

4.3.5 Conclusion on the Codes of Good Practice

This section has detailed the nature and content of the Codes of Good Practice as well as analysed their legal nature. In light of the *sui generis* nature of the Codes, they are implemented through an ingenious 'carrot-stick' mechanism facilitated by accredited BEE rating agencies. The penultimate instruments to be addressed are the Sector Transformation Charters.

²¹⁹ C000S020 of 2005 : Department of Trade and Industry (Phase One 2005 Codes) Code 000 'Framework for the Measurement of Broad-Based Black Economic Empowerment : Statement 020 'The Approval, Accreditation and Regulation of BEE Verification Agencies' at para 5.3 at www.dti.gov.za (Accessed on 29/01/07).

²²⁰ The DTI Guide to Interpretation (n 132) 19.

²²¹ *Ibid.*

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ C000S020 of 2005 (n 219) para 1.1 & para 5. An 'Accreditation Body' means (in terms of para 1.1.1 & para 1.1.2) the South African National Accreditation System, a company registered under s 21 of the Companies Act of 1973 and affiliated to the Department of Trade and Industry; or any other body authorised by the Minister to undertake accreditation of Verification Agencies'. (C000S020 of 2005 (n 219) para 1.1).

²²⁵ For an enumeration of the specified criteria see C000S020 of 2005 (n 219) para 7.5.4

²²⁶ The DTI Guide to Interpretation (n 132) 19.

4.4 THE SECTOR TRANSFORMATION CHARTERS

The BEE Transformation Charters are sector specific regulatory instruments voluntarily developed by stakeholders in a particular industry together with government departments.²²⁷ Transformation Charters reflect a sectors commitment to BEE²²⁸ and are gazetted ‘for general information’ purposes in terms of s 12 of the Act.²²⁹ Furthermore, they aim to guide transformation²³⁰ and to prescribe the benchmark for BEE compliance that entities in a particular sector must meet.²³¹

4.4.1 Legal Status of the Sector Transformation Charters

The status of the Transformation Charters is ascertainable through a comparative evaluation with the status of the Codes.²³² It is submitted that the Transformation Charters are legally subordinate to the Codes and by implication assume an inferior legal status to both delegated legislation and soft law. This can be gleaned from the bodies responsible for the enactment of the respective instruments. The Codes are issued by the Minister, whereas the Transformation Charters are formulated by industry and only then gazetted on approval by the Minister. Furthermore, the Act²³³ expressly states that the Transformation Charters are simply ‘for general information’ purposes.²³⁴ The Guide to Interpreting the Code²³⁵ reiterates this and also states that Transformation Charters are merely an expression of an industry’s ‘commitment to transformation’.²³⁶ In light of the above considerations, it is submitted that

²²⁷ Section 12 of the BBBEE Act 53 of 2003 and Osode (n 3) 114. ‘The Department of Minerals and Energy (DME) initiated the first Charters in the Petroleum and Mining sectors. These were followed by the Financial, ICT, Tourism, Transport, Agriculture, Advertising, Construction and Property Sector Charters’. Balshaw (n 123) 90.

²²⁸ C000S010 of 2005: The Department of Trade and Industry (Phase One 2005) Code 000 ‘Framework for the Measurement of Broad-Based Black Economic Empowerment: Statement 010 ‘Guidelines for the Development and Gazetting of Transformation Charters’ at para 7.1 at www.dti.gov.za (Accessed on 29/01/07).

²²⁹ Section 12 of the BBBEE Act 53 of 2003 mandates the Minister to ‘publish in the Gazette for general information and promote a Transformation Charter for a particular sector of the economy, if [he] is satisfied that the Charter-

(a) has been developed by major stakeholders in that sector;

(b) advances the objectives of [the] Act’.

²³⁰ C000S010 of 2005 (n 228) para 4.

²³¹ Osode (n 3) 114.

²³² It was submitted under paragraph 4.3.1 that the Codes are soft law.

²³³ Act 53 of 2003.

²³⁴ Section 12 of the BBBEE Act 53 of 2003.

²³⁵ The DTI Guide to Interpretation (n 132).

²³⁶ The DTI Guide to Interpretation (n 132) 16.

the Charters can be classified as voluntary partnership agreements binding only private sector signatories.²³⁷

4.4.2 The Sector Transformation Charters in Perspective

In an attempt to illustrate the content of the Charters this paper provides, in APPENDIX 3, a telescopic picture of the Transformation Charters governing the Mining, Financial Services and Information and Communications Technology (ICT) sectors. The last instrument to be discussed is the BEE Strategy Document.

4.5 THE BEE STRATEGY DOCUMENT

The Strategy Document was the initial regulatory instrument issued by the Minister and served as a general framework for BEE.²³⁸ It contained a basic scorecard with percentage weightings²³⁹ (and it is upon this Card that the present Scorecard is modelled), but it did not outline governing principles, or how the scorecard was to be applied.²⁴⁰ Section 11 of the BBEE Act²⁴¹ now specifically mandates the Minister to release a Strategy Document, and it has been submitted that the initial Strategy is likely to be re-issued in terms of s 11.²⁴² Interestingly, once resting at the apex of the BEE regulatory hierarchy, the Strategy Document has since been relegated to the nadir of the pyramid on account of the detailed principles contained in the BBEE Act,²⁴³ the Codes and the Transformation Charters.

²³⁷ Balshaw (n 123) 84 & 91.

²³⁸ The DTI Guide to Interpretation (n 132) 2.

²³⁹ The Scorecard ‘worked on a weighted average, and allocated percentage points to seven criteria (i) Ownership (20%), (ii) Management (10%), (iii) Employment Equity (10%), (iv) Skills development (20%), (v) Preferential Procurement (20%), (vi) Enterprise Development (10%) and (vii) Variable Criteria (10%) (The DTI Guide to Interpretation (n 132) 4).

²⁴⁰ The DTI Guide to Interpretation (n 132) 2.

²⁴¹ Section 11 of the BBEE Act entitled ‘Strategy for broad-based black economic empowerment’ provides:

‘ 11(1) The Minister-

(a) must issue a strategy for broad-based black economic empowerment;
(b) may change or replace a strategy issued in terms of this section.

(2) A strategy in terms of this section must-

(a) provide for an integrated co-ordinated and uniform approach to broad-based black economic empowerment...;
(b) develop a plan for financing broad-based black economic empowerment;
(c) provide a system for organs of state, public entities and other enterprises to prepare broad-based black economic empowerment plans and to report on compliance with those plans; and
(d) be consistent with this Act’.

²⁴² Cheadle, Thompson and Haysom *Black economic empowerment: commentary, legislation and charters* 1-8 as cited in Safi ‘How Broad is Broad-Based Black Economic Empowerment: A critical Analysis of the Challenges facing BEE’ Unpublished LLB Mini-Dissertation, University of Cape Town (2006) at 12.

²⁴³ Act 53 of 2003.

4.6. CONCLUSION ON THE REGULATORY FRAMEWORK

In concluding this section on the regulatory framework, a final comment is salutary. On the one hand the regulatory framework is extremely complex. On the other hand, the comprehensiveness of the framework admirably caters for the nuances of the enterprise as well as provides a solid foundation to facilitate the realisation of BEE objectives. As a result of the latter point, BEE has been made some progress, and this paper will now turn to review these strides.

5. **BEE PROGRESS: MARGINAL STRIDES**

BEE as a work in progress has made marginal strides and this section of the paper intends to analyse this advancement. This assessment will be made by looking at a number of BEE deals that have been concluded in the mining, financial and ICT sectors, and by reviewing the extent of equity transfer in the listed environment.

5.1 BEE DEALS

A common method of gauging BEE progress is to look at BEE deals that have been concluded over the years. The Johnnic deal was the first big and ‘visible buy-in by black businessmen’,²⁴⁴ and was regarded as the ‘symbolic birth of BEE’,²⁴⁵ and since then, numerous deals have been closed. Mining successes include, among others, the deal concluded in 2000 between Anglo Coal and Billiton and Eyesizwe, which resulted in the creation of the fourth largest coal producer in South Africa.²⁴⁶ In the financial sector, commendable schemes include the Old Mutual and the Nedbank deals both concluded in 2005. The Old Mutual deal was valued at R7.2 billion, and entailed the sale of 12.75% of Old Mutual plc’s local businesses to black staff and black investors.²⁴⁷ The Nedbank deal comprised a bonus-share scheme with clients as the intended beneficiaries.²⁴⁸ In the ICT sector, a notable arrangement is the merger between Mthombo-IT (a black owned company) and EOH, a major player in the ICT field.²⁴⁹ For a more comprehensive outline of the deals concluded in these three sectors see APPENDIX 4.

²⁴⁴ Kennedy ‘Black Economic Empowerment in the South African Business Community: A Beginning of Economic Empowerment of Black South Africans’ (1997) *MBA Thesis: Graduate School of Business University of Cape Town* 31.

²⁴⁵ *Ibid.*

²⁴⁶ AngloAmerican plc Black Economic Empowerment Report 2002.

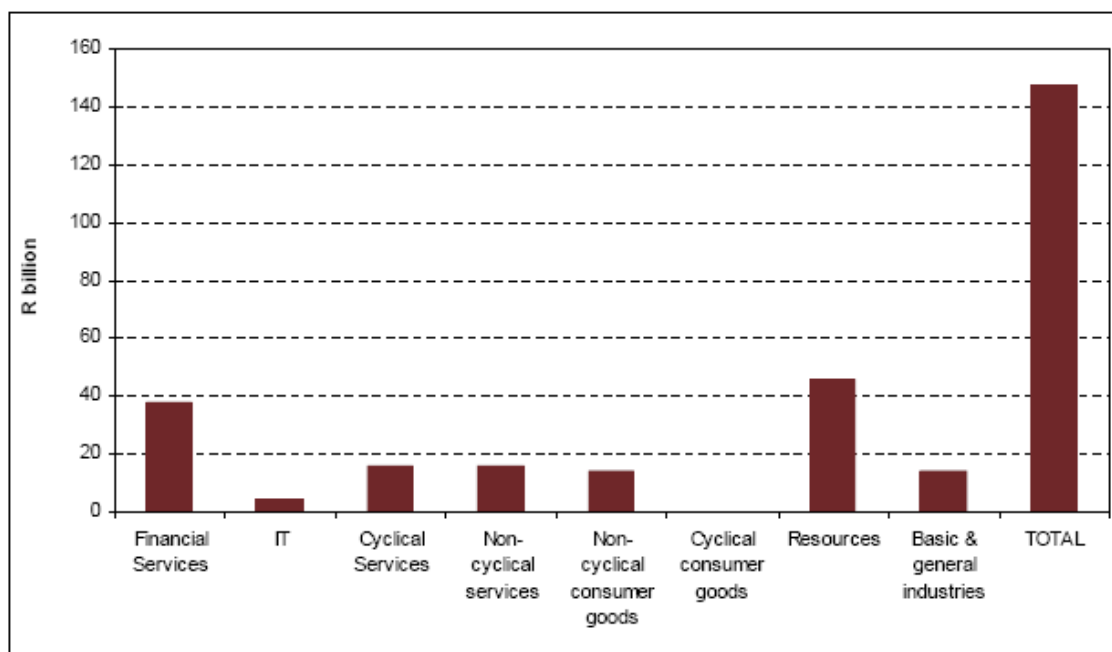
²⁴⁷ ‘Old Mutual unveils R7.2bn BEE deal’ 20 April 2005 at <http://business.iafrica.com/iacnews/433925.htm> (Accessed on 29/08/2005).

²⁴⁸ The Scheme is known as the ‘Nedbank Eyethu Ownership Plan’, and is part of a bigger deal aimed at issuing 41.3 million new ordinary Nedbank shares, in an endeavour to see ‘11.5% of Nedbank’s South African operations become black-owned’. ‘Nedbank BE share-scheme goes live’ *Mail & Guardianonline* at <http://www.mg.co.za/article> (Accessed on 19/08/2005).

²⁴⁹ Mthombo I.T Services Pamphlet, *Brainstorm* (2005).

Graph 1 below illustrates the total value of BEE deals from inception until 1996. As is apparent, the value of these deals has been significant.

Graph1: Total deal value since inception (1996)²⁵⁰



Source: Shubane, K & Reddy, C 'Behind The Deals' (2005) *BusinessMap Foundation:Economic Transformation and Empowerment* 11.

5.2 PROGRESS IN THE LISTED ENVIRONMENT

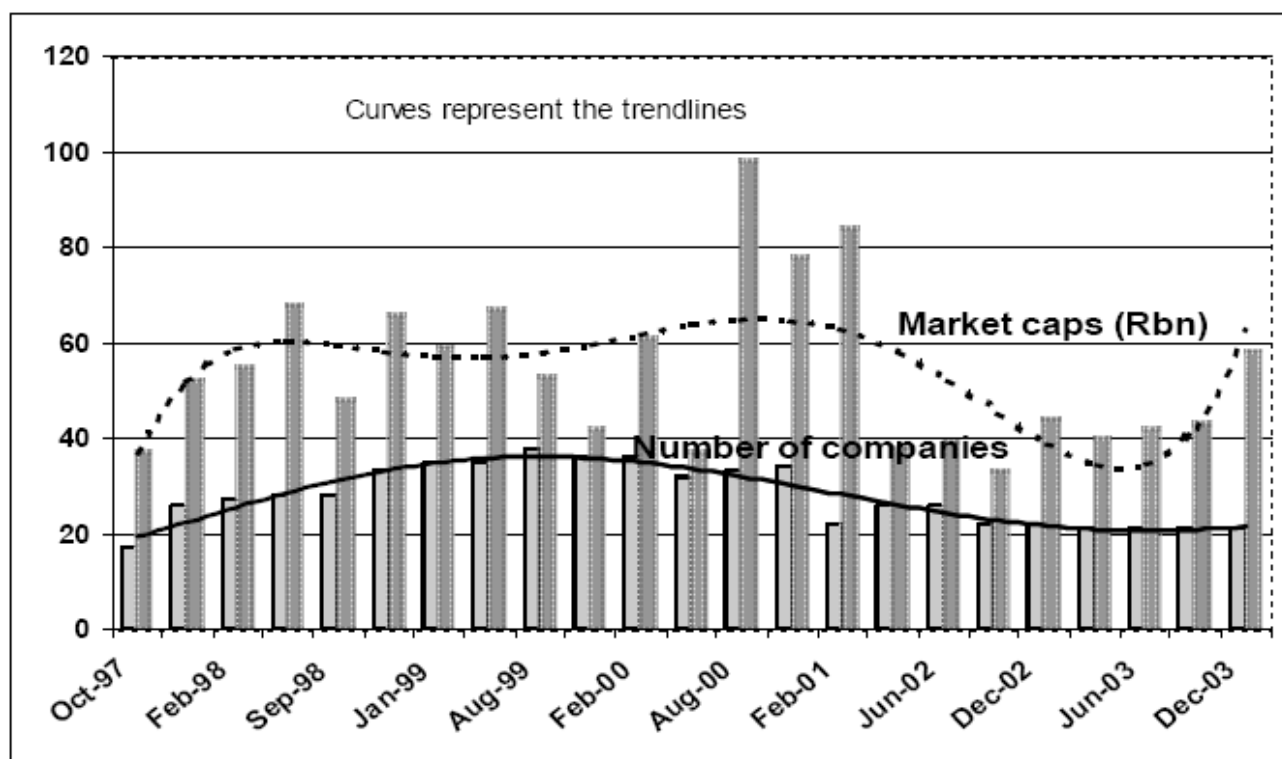
Another indicator of BEE progress is the extent of equity ownership. There has been a notable increase in Black equity ownership and control of SA companies.²⁵¹ Between 1993 and 1997, Black ownership increased from under 1% to 15-18% in market capitalisation on the Johannesburg Stock Exchange (JSE).²⁵² Further patterns of equity ownership, between 1997 and 2003, are reflected in Graph 2 below. (For a representation of figures in tabular form see APPENDIX 5).

²⁵⁰ This graph has been sourced from Shubane et al 'Behind The Deals' (2005) *BusinessMap Foundation:Economic Transformation and Empowerment* 11.

²⁵¹ Kennedy (n 244) 30.

²⁵² *Ibid.*

Graph 2: Trends in Black Control, Market Capitalisation and the Number of Firms on the JSE²⁵³



Source: Reddy, C 'Empowerment on the JSE' (2004) *Empowerment 2004 Black Ownership: Risk or Opportunity in Business Map Foundation* 57.

Graph 2 above shows that notwithstanding the slight trough reflected in 2002-2003, the market capitalization pattern reflects a trend towards increased Black control on the JSE.²⁵⁴ This advancement should not be overstated however, as there are contrary indicators. For example, in relation to the intended target of 25% for equity, direct Black ownership on the JSE amounts to a mere 1.6%.²⁵⁵ Furthermore, the Graph 3 below indicates that relationally, the number of BEE firms on the JSE is miniscule.²⁵⁶ As an aside, it should be noted that these equity control indicators provide merely a telescopic view of BEE performance as statistics in the unlisted environment are not considered.

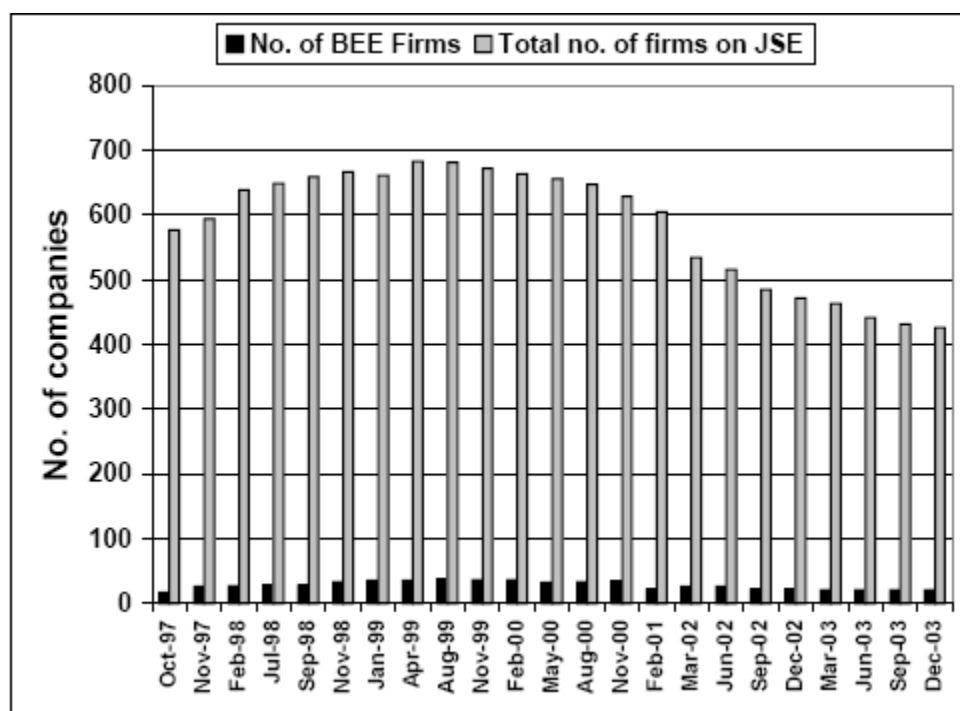
²⁵³ Reddy, C 'Empowerment on the JSE' (2004) *Empowerment 2004 Black Ownership: Risk or Opportunity in Business Map Foundation* 57.

²⁵⁴ *Ibid.*

²⁵⁵ Balshaw (n 123) 97 citing empowerdex as cited in Safi 'How Broad is Broad-Based Black Economic Empowerment: A critical Analysis of the Challenges facing BEE' Unpublished LLB Mini-Dissertation, University of Cape Town (2006) at 40.

²⁵⁶ Reddy (n 253) 56.

Graph 3: Number of Black Controlled firms relative to the entire JSE²⁵⁷



Source: Reddy, C 'Empowerment on the JSE' (2004) *Empowerment 2004 Black Ownership: Risk or Opportunity in Business Map Foundation* 56.

The above analysis reveals that notwithstanding relative successes, BEE progress is far from stellar. This is more than likely due to the numerous challenges facing the BEE drive. The next part of this paper will address some of these issues, and in the interests of clarity these challenges will be divided into two broad categories - the first, dealing with challenges that are evident from the BEE regulatory framework itself and the second, discussing those that are external to this framework.

²⁵⁷ Sourced from Reddy (n 253) 56.

6. THE CHALLENGES: APPARENT HURDLES

There are several hurdles facing BEE. Some of these challenges arise from within the regulatory framework, however several are external to the governing structure. This paper will be limited to a critical analysis of the Codes, the Transformation Charters, and the Sector Codes. The external challenges that will be addressed are the problems of financing; the broadness of broad-based BEE, fraud, and constraints of attitude.

6.1 CHALLENGES EVIDENT FROM THE REGULATORY FRAMEWORK

6.1.1 The Codes of Good Practice and the Sector Transformation Charters

Since their inception, the Codes and Transformation Charters have undergone dramatic change. Many of the original difficulties have been resolved, however several ambiguities linger. This section of the paper will turn to consider certain aspects of this evolutionary trajectory. This critical analysis will involve a discussion of the content of the Codes, and an assessment of the interrelationship between the Codes, the Transformation Charters and the Sector Codes.

6.1.1.1. The Codes of Good Practice: A Critical Analysis

The BEE Codes are commendable on two main scores. First, the most apparent strength is the detailed consideration of vital aspects of the endeavour as well as the inclusion of key entities within the ambit of application. The benefit of detail is the reduced margin of appreciation of these rules and their relevance.²⁵⁸ Secondly, in providing cross-sector standards, the Codes unify the system²⁵⁹ and thus ensure a more even and wider spread of empowerment.²⁶⁰ Several commendable adjustments have been made to bolster these strengths. Nonetheless, certain problems remain, and worse still, new ones have been created. These issues will now be canvassed.

²⁵⁸ Chirwa 'The Long March to Binding Obligations of Corporations in International Human Rights Law' (2006) Vol 22 Issue 1 *South African Journal on Human Rights* 91.

²⁵⁹ Shubane (n 250) 12.

²⁶⁰ Shubane (n 250)12.

6.1.1.1.1 Content of the Codes of Good Practice

Prior to the release of the approved Codes, changes made to them have never been more apparent. Prominent features of the Codes that reflect these changes are: the complexity of the Codes; the Scorecard targets, and the ‘Once Empowered Always Empowered Principle’.

6.1.1.1.1.1 Complexity of the Codes: A Labyrinthine Regime Remedied?

One of the most striking changes is the extent to which the Codes have been simplified and condensed. For as long as the Codes have been in existence, dissidents argued that the Codes were complex to the point of inefficaciousness, standing to jeopardize the entire initiative and negatively impact on the economy.²⁶¹ Some analysts noted that adherence to the Codes would impose arduous financial and administrative burdens requiring extensive professional advisory support services.²⁶² Germien du Plessis, an equity partner at debt and equity specialists Bravura, noted that ‘the amount of information required in terms of preferential procurement, which forms only one component of the Scorecard, [was] comparable with tax law obligations and [came] down to an audit of a company’s entire supply chain’.²⁶³

In reaction to these valid criticisms, the DTI has since attempted to alleviate the complexity of the Codes. The volume of the Codes has been drastically reduced, with several Statements being cut down to almost half of what they were before.²⁶⁴ A further notable trait is that the readability and understandability of the codes has increased immensely. This can largely be attributed to the fact that much philosophical and contextual detail has been removed, most definitions have been significantly abridged, and most commendably, the information which was previously conveyed in dense convoluted paragraphs, is now laid out succinctly in list form with numbered sub-paragraphs as guidance.²⁶⁵ These features have the

²⁶¹ Mathabo le Roux, ‘Mpahlwa, business to clarify BEE codes’ *Business Day* 11 July 2006 at <http://www.businessday.co.za/articles/topstories.aspx?ID=BD4A230554> (Accessed on 11 July 2006).

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ Code 000S000 of 2005 (n 112) is a good illustration of this condensation.

²⁶⁵ These adjustments are well illustrated in C000S000 of 2005 where: the abstract has been removed; The lengthy introduction to the Statement has been deleted; Definitions have been shortened; Several of the qualitative guidelines previously in para 21-34 of the Code 000S000 of 2004 at www.dti.gov.za Accessed on 12/12/06) have been deleted; A table illustrating the organisation of the Codes has been inserted which gives a convenient overview; and lastly, the nature of each individual element is now only briefly enumerated in no

effect of transforming the Codes into a document akin to a practitioner's manual. The DTI has further assisted by introducing a 'Guide to Interpreting the Codes',²⁶⁶ as part of the First Phase of the Codes, which serves as a valuable interpretative aid clarifying several rules in useful diagrammatic and tabular form. These modifications are extremely laudable in making the Codes more 'user-friendly' and address the complexity problem to a large degree.

Several features, on the other hand, raise the concern that perhaps the Codes have been oversimplified. One incidence is that the original Generic Scorecard has been stripped down to a mere indication of raw score points for each BEE Element without mention of corresponding targets, indicators or percentage weightings.²⁶⁷ (See APPENDIX 6 which reflects the 2004 comprehensive Scorecard in relation to the 2005 simplified Scorecard). The targets and indicators are now included only in the individual Element Scorecards as contained in the respective Statements. It is submitted that even if the removal of indicators and targets from the Generic Scorecard was done with a view to simplification, the omission of these crucial aspects of BEE measurement renders the primary BEE Scorecard inadequate and misleading, necessitating cumbersome cross-referral. The broad overview provided by the old Scorecard was useful, and in its previous form was relatively uncomplicated. It is submitted that the DTI has erred gravely in altering the Scorecard to this extent.

A commendable alteration to the Generic Scorecard however, has been the change in calculation method when determining the total number of points earned, from a percentage weighted average to a raw point weighted average. The original method of converting the raw point score to a percentage score was a complicating and superfluous step in light of the fact that the total point calculation is out of a possible 100 points. This means that irrespective of whether a percentage or raw score is used, the statistical outcome will be the same. Interrelated issues that will now be considered are the targets and stipulated timeframes contained in the individual Element Scorecards.

more than a single sentence for each element, where as before each element was assigned no less than two dense paragraphs.

²⁶⁶ DTI Guide to Interpretation (n 132).

²⁶⁷ C000S000 of 2005 (n 112) para 8.

6.1.1.1.1.2 Targets and Timing: An Issue of Realism

A common criticism of the Codes has been that the targets are considered to be ‘unrealistically high’ and are unlikely to be attained in the stipulated timeframe.²⁶⁸ A 2005 Empowerdex Review of measurable listed entities showed that only one company reached the ‘excellent contributor’ rank, and only 26% of these entities were in a position to show even minimal compliance.²⁶⁹ In a recent report it was cogently argued that the 25% direct ownership target is ill conceived as it is unreasonable to expect black people to acquire 25% of all companies; even the commercially unsound ones.²⁷⁰ The Scorecard targets remain unchanged despite these concerns, but it is hoped that difficulties may be alleviated by the target leeway afforded by the Sector Codes to be discussed in para 6.1.1.1.2 below. The DTI has eased anxiety on the timing issue by professing to relax the timeframes stipulated for the elements comprising the Human Resource and Indirect Empowerment Components of BEE,²⁷¹ however only time will reveal the sufficiency of this leniency.

6.1.1.1.1.3 The ‘Once Empowered Always Empowered Principle’: Perpetual Recognition

The DTI has released a document that introduces a new dimension to the equity ownership element of the BEE Scorecard.²⁷² The principle, coined the ‘once empowered always empowered principle’, is broadly predicated on the idea that a measured entity will still earn empowerment points on account of black equity participation even after these Black shareholders sell their interest in the entity.²⁷³ This idea has caused waves of controversy across the board and it is this ferocious debate that will now be attended to.

The initial stance taken by the Codes was that sale of Black equity resulted in the loss of BEE ownership points by the company concerned,²⁷⁴ the logic being to nurture long-term

²⁶⁸ Mathabo le Roux (n 261).

²⁶⁹ Lester ‘Weightings in Favour of black women’ (May 2005) *Black Economic Empowerment: Business Day Survey*.

²⁷⁰ Rumney ‘The end-all of BEE-all’ Mail and Guardian 18 January 2007 at www.mg.co.za/articlePage.aspx?articleid=296226&area=/insight/insight_economy_business/ on (Accessed on 29/01/07).

²⁷¹ Wray ‘Cabinet-Approved BEE Codes are Drawing Criticism’ Dec 8 2006 Business Report at www.busrep.co.za (Accessed on 08/12/06)

²⁷² Rumney (n 270).

²⁷³ Vuyo Jack ‘Long Term BEE Ownership must build in liquidity’ (12/122006) Business Report at www.busrep.co.za/index.php?fArticleId=3530845&fSectionId=2512&fSetId=622 (Accessed on 29/01/07)

²⁷⁴ *Ibid.*

ownership by Black investors.²⁷⁵ To secure these ownership points then, companies tend to institute ‘lock-in’ provisions to ensure that Black equity remains in Black hands.²⁷⁶

However, the negative implications of this are two-fold. First, the scarcity of Black capital means that shareholders desirous to sell their shares to other Black shareholders are often unable to find liquid Black purchasers.²⁷⁷ This has the secondary effect of ‘forc[ing] Black shareholders [to remain in the company] and...see their paper wealth rise and fall without the ability to cash in’.²⁷⁸ It is argued that the ‘once empowered always empowered’ principle will obviate the need for such ‘lock-ins’, enabling Black shareholders to sell their equity to previously advantaged persons, while ensuring that companies are still able to earn BEE ownership points.²⁷⁹

The problem with this principle, so understood, is clear. Its application will inevitably result in short-term Black ownership defeating the objectives of the Codes,²⁸⁰ and ‘dilut[e] black influence’ considerably.²⁸¹ A further concern is that investee companies are usually responsible for engineering BEE deal structures and, in terms of this principle, companies eager to expeditiously rid themselves of BEE shareholders may ‘structure deals that [are] unfavourable to the BEE partner’.²⁸²

In an attempt to counter these adverse effects, the DTI proposes only *partial* recognition of BEE points by such companies.²⁸³ This would mean that in order to score ownership points, companies would have to maintain a minimum share requirement by permitting Black investors to ‘cash in’ only part of their investment.²⁸⁴ This pragmatic compromise would enable long-term ownership, afford Black investors the freedom of equity trade, and allow companies to retain points depending on the ‘level of transformation achieved by the company prior to the partial sell-off of equity’.²⁸⁵ The problem remains however that, notwithstanding the suggested partial recognition middle-ground, the media

²⁷⁵ *Ibid.*

²⁷⁶ “‘Lock-in’ clauses prevent black people from selling their shares to non-black people’ Vuyo Jack (n 273).

²⁷⁷ Vuyo Jack (n 273).

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ Wray (n 271).

²⁸² *Ibid.*

²⁸³ Rumney (n 270).

²⁸⁴ Vuyo Jack (n 273) and Rumney (n 270).

²⁸⁵ Vuyo Jack (n 273).

continues to broadcast that the ‘once empowered, always empowered principle’ is the tenet upon which the ownership scorecard centres. The responsibility rests with the DTI to dispel this misconception by widely publicizing the correct working of the rule in sufficient detail to pre-empt interpretative disputes.²⁸⁶

6.1.1.1.2 Interrelationship between the Codes of Good Practice, the Sector Transformation Charters and the Sector Codes

The strength of the Transformation Charters is ironically also a weakness for BEE generally -the sector specificity of the Transformation Charters affords the opportunity for the particular empowerment needs of each sector to be catered for individually,²⁸⁷ but it is this same specificity that causes disparate empowerment progress in BEE as a whole. Advocates of the Charter system argue that the ‘codes over-centralise issues’,²⁸⁸ and ignore both the specific strengths and weaknesses in need of redress,²⁸⁹ while proponents of the Codes emphasise the need for uniformity. The flare of this debate is fuelled by the inter-relational bifurcation of the instruments which provide a basis for each of the polar arguments.

The inconsistencies between the Codes and Transformation Charters have been a longstanding and highly contentious issue. The disparities in indicators, targets and weightings arose primarily because several Transformation Charters were developed before the institution of the Codes, the BEE Act, and even before the introduction of the Strategy on BBEE,²⁹⁰ leaving these Charters with little point of reference.²⁹¹ Even Charters instituted after the Strategy were either loosely modelled on the scorecard as it appeared in the Strategy, or were a mere statement of a general commitment to the BBEE philosophy.²⁹² At the time of writing, disparities in equity targets were noted and are depicted in Table 1 below.

²⁸⁶ Rumney (n 270).

²⁸⁷ Shubane (n 250)12.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ DTI Guide to Interpretation (n 132) 2.

²⁹¹ DTI Guide to Interpretation (n 132) 2.

²⁹² DTI Guide to Interpretation (n 132) 2.

Table 1: EQUITY TARGET INCONSISTENCIES ²⁹³

	THE CODES	ICT CHARTER	FINANCIAL SECTOR CHARTER	MINING INDUSTRY CHARTER
EQUITY	25% plus one vote gets the full ownership score but the shares must be paid up in full.	35 % by 2010; 30% by 2015 subject to a range of conditions.	10% equity, provided that the financial institution has a target of 33% of black directors on its board. A target of 25% black ownership at holding company level is set for 2010.	26% equity within 10 years.

Source: Singh, S & Jekwa, S et al 'Cracking the Codes' (April 15, 2005) *Financial Mail* at 19. Statistics correct at time of writing.

Such inconsistencies between the Codes and the Transformation Charters create uncertainty in the different sectors thus impeding empowerment transactions²⁹⁴ and deterring potential foreign investors.²⁹⁵

In response to the overwhelming proposals that the Transformation Charters be harmonised to the Codes, C000S010 of the Phase One 2004 Codes²⁹⁶ outlined a mechanism to unify the system while maintaining a degree of flexibility. The default position was that the Transformation Charters were to contain the same indicators, targets and weightings as

²⁹³ Singh (n 140) 19.

²⁹⁴ Singh (n 140) 18.

²⁹⁵ Ritchken 'Calling Things By Their Name: BEE in a Globalising Market Economy' (2004) *Empowerment 2004 Black Ownership: Risk or Opportunity in Business Map Foundation* 8.

²⁹⁶ C000S010 of 2004 : Department of Trade and Industry (Phase One 2004 Codes) Code 000: 'Broad-Based Black Economic Empowerment Framework : Statement 010 'Sector Transformation Charters' at www.dti.gov.za (Accessed on 19 of December 2006).

depicted in the Codes.²⁹⁷ However, subject to a number of conditions, these pointers and values could be deviated from. Sectors could set their own *indicators* if they could demonstrate that:

- 'a) the suggested indicator can best measure the sector's contribution to that element of broad-based BEE;
- b) the suggested indicator reflects the key drivers within the sector related to that element of broad-based BEE;
- c) the suggested indicator is in line with sound economic principles, and d) reasons to support how the currently required indicator, as per the Code of Practice, does not measure the particular element of broad-based BEE adequately'.²⁹⁸

In addition, Statement 010 mandated that 'adequate justification' be given if a Sector *target* 'differ[ed] significantly' from that in the Generic Scorecard.²⁹⁹ Lastly, *weightings* attributed to each BEE element³⁰⁰ could vary up to 10% from those reflected in the Codes, however such variance was subject to a sub-minimum weighting of 5%.³⁰¹ Again, 'adequate justification' for deviation had to be provided.³⁰² A further qualification for this weighting variation to obtain was that 'the total weighting for each individual component, ie direct empowerment, human resources and indirect empowerment, [had to] remain constant as per the Generic Scorecard...'.³⁰³

This scheme reached a comfortable compromise between the two instruments. It enabled standardisation and consolidation of the regulatory system, while accommodating a degree of flexibility through the variation allowances.

The 2005 Codes, in discussing Transformation Charters, make no mention of any of the above substantive aspects and focus almost exclusively on the procedural aspects that relate to the gazetting of Transformation Charters.³⁰⁴ This shift in focus could be a result of the recognition of the dual life of the Charters. On the one hand they, *in and of themselves*, serve to convey a commitment to BEE and, on the other hand, they are *instrumental* in that Sector Codes are often born of Transformation Charters. The cursory treatment of

²⁹⁷ C000S010 of 2004 (n 296) para 28-30 & 32.

²⁹⁸ C000S010 of 2004 (n 296) para 29.

²⁹⁹ C000S010 of 2004 (n 296) para 31.

³⁰⁰ As a useful reminder, the BEE element weightings: (i) Ownership (20%), (ii) Management (10%), (iii) Employment Equity (10%), (iv) Skills development (20%), (v) Preferential Procurement (20%), (vi) Enterprise Development (10%) and (vii) Residual element (10%).

³⁰¹ C000S010 of 2004 (n 296) para 33-34.

³⁰² C000S010 of 2004 (n 296) para 33.

³⁰³ C000S010 of 2004 (n 296) para 35.

³⁰⁴ C000S010 of 2005 (n 228) para 5.

Transformation Charters in paragraph 5 of C000S010³⁰⁵ may, it is submitted, be attributed to the capacity in which the Charters are being viewed that is, *in and of themselves*, and as such scant substance is not fatal. Substantive matters of inter-relationship and content become crucial when one views the Charters in their *instrumental* capacity and it is this that will now be explored.

Paragraph 6 of C000S010³⁰⁶ of the new Codes permits the Minister ‘to develop Sector Codes or convert a Transformation Charter into a Sector Code’ provided a number of conditions are fulfilled.³⁰⁷ Fundamentally, the process requires sectors to apply in writing to the Minister attaching both an analysis of the Transformation Charter or proposed Sector Code drawn up by an ‘independent party appointed in consultation with the Minister’, as well as a copy of the Charter or proposed Sector Code that has been signed by sector stakeholders and by the Ministry in charge of that sector.³⁰⁸ Subject to public comment and ultimately the approval of the Minister, the final step is the official publication of either instrument in the gazette in terms of S 9 of the BEE Act.³⁰⁹ Once gazetted therefore, Sector Transformation Charters are converted to Codes of Good Practice,³¹⁰ elevated from mere partnership agreements to, on the one end, delegated legislation from the public sector perspective and, on the other end, soft law status from the private sector perspective.³¹¹

Entities governed by a specific Sector Code will be measured in accordance with the Sector specific scorecard as it appears in that Code.³¹² Despite the elevation of status to Codes of Good Practice, when any ‘uncertainty arises in the interpretation of a Sector Code’ the Generic Codes take precedence.³¹³ Furthermore, the Generic Codes apply to sectors that are ungoverned by a Sector Code, notwithstanding the existence of a Sector Transformation Charter issued in terms of s 12 of the BEE Act.³¹⁴

³⁰⁵ *Ibid.*

³⁰⁶ C000S010 of 2005 (n 228) para 6.

³⁰⁷ *Ibid.*

³⁰⁸ C000S010 of 2005 (n 228) para 6.1; para 6.2 and para 6.3.

³⁰⁹ C000S010 of 2005 (n 228) para 6.

³¹⁰ C000S010 of 2005 (n 228) para 6.10 & para 7.3.

³¹¹ See para 4.3.2 above for more detail on the legal status of the Codes of Good Practice. From hereon in the Transformation Charters in their instrumental capacity will be referred to as Sector Codes to avoid confusion.

³¹² Balshaw (n 123) 84 and 92.

³¹³ C000S010 of 2005 (n 228) para 7.4.

³¹⁴ C000S010 of 2005 (n 228) para 7.2

A shortcoming of the framing is that the new Generic Codes are only inadvertently instructive to drafters when it comes to matters of substance that sectors are to consider in the formulation of their Sector Codes. Information relating to what is required in terms of the content of the instruments is only referred to as part of what the ‘independent party’ is required to look for in formulating its analysis, and is not overtly directive to the Sector Code drafters in this regard.

A further change is that the new Codes do not *expressly* inform drafters, as was the case in the 2004 Codes, that target and weighting deviations from the Generic Codes are permitted. It is only by inference that one can deduce that variations are allowed if one looks to the explanations that the ‘independent party’ needs to provide in their analysis, which includes an indication and explanation of any deviations apparent in the proposed Sector Code³¹⁵ showing that any such divergences are ‘not inconsistent with the objectives of the Act’, do not ‘distort the operation of the Generic Codes’ and are ‘adequately justified on sound commercial principles and/or developmental grounds pertaining to the sector’.³¹⁶ As opposed to the numerical parameters reflected in the 2004 Codes, the new Statement seems to be predicated on principled restrictions. This is commendable in that it accommodates a greater degree of flexibility in light of the peculiarities of each sector. However the danger of such principled demarcations is first, that they may be open to abuse and inconsistencies given the discretion required in making such determinations, and also that they may potentially defeat the quantitative unification function that the Generic Codes fulfil.

It is submitted that the moderation function played by the ‘independent party’ and the ultimate approval of the Sector Codes by the Minister may avert this danger. Nevertheless, the middle-ground between standardisation and flexibility is a delicate balance to achieve, and it is submitted that although principles should root formulation, statistics must not branch too far apart, as a level of standardisation is indispensable in comparing progress across sectors and measuring BEE progress as a whole. The last complaint is that the qualifications for an independent third party to be appointed as such by the Minister are not spelt out which is an unfortunate omission.

³¹⁵ C000S010 of 2005 (n 228) para 6.1; para 6.2 & para 6.3

³¹⁶ C000S010 of 2005 (n 228) para 6.3.

This paper projects that in light of the role that Sector Codes are to play, Sector Transformation Charters are, *in and of themselves*, likely to become redundant. This is because the onerous procedure to establish a Transformation Charter in terms of s 12 of the Act³¹⁷ is incommensurate with the aim of simply illustrating a commitment to BEE.³¹⁸ The time and resources employed for the mere formal declaration of devotion would be better utilised in the construction of Sector Codes. In addition, ‘Enterprise Charters and Black Economic Empowerment Plans’³¹⁹ provide a simpler and more economical alternative to achieve the same purpose. It must be remembered however, that Sector Transformation Charters may still prove useful when their *instrumental* role is considered in the development of Sector Codes.

6.1.2 Conclusion on the Internal Challenges

In conclusion, the steps taken by the DTI to simplify and restructure the Codes are praiseworthy. The evolution of the regulatory instruments is an incremental process and has come a long way in providing certainty and clarity on a myriad of issues. However the elusive balance that would make them user-friendly and yet informative enough to facilitate implementation, as well as standardised and yet peculiar enough, is yet to be achieved. Ultimately, practice will reveal the pragmatic challenges and solutions.

³¹⁷ Act 53 of 2003.

³¹⁸ Balshaw (n 123)91.

³¹⁹ C000S010 of 2005 (n 228) para 8. Provides: ‘All entities are encouraged to develop their own enterprise plans as part of their commitment to BEE; para 8.2 An enterprise plan serves as evidence of the voluntary commitment of an enterprise towards achieving those objectives; 8.3 An enterprise BEE plan does not enjoy any recognition under the Code and will not be gazetted under the Act’.

6.2 CHALLENGES OUTSIDE OF THE REGULATORY FRAMEWORK

6.2.1 Financing BEE

6.2.1.1 Source of Funds

The financing of BEE is a particularly thorny issue³²⁰ mainly because beneficiaries of BEE usually have insufficient savings or obtain credit at extremely high interest on account of being viewed as high risk clients by any potential financiers.³²¹ BEE entrepreneurs are therefore severely restricted in accessing business opportunities.³²² A further contributing factor is that debt instruments are usually used to purchase equity and as a result profits made by black companies are channelled toward servicing these debts.³²³

To compound the situation, the Act³²⁴ does not outline exactly how BEE is to be financed. The only mention of financing is in s 11 (2) (b) where, in terms of the strategy issued by the Minister in terms of s 11 (1) (a), the Minister is obliged to ‘develop a plan for financing broad-based black economic empowerment’.³²⁵ The question arises whether the state is obliged to provide financing for BEE and if so, to what extent?³²⁶ It has been submitted that the obligation imposed by s 11 (2) (b) imposes on the State a duty to devise a workable plan envisaged by the section, and not necessarily a duty to finance BEE directly from state funds.³²⁷ Through this plan, the state can formulate a mechanism whereby participants of the private sector or international funding houses can finance BEE.³²⁸ Failing the mobilisation of non-state funds, it has been submitted that the government would then be obliged to deploy state resources.³²⁹

³²⁰ Osode (n 3) 117.

³²¹ *Ibid.*

³²² *Ibid.*

³²³ Kennedy (n 244) 42.

³²⁴ Act 53 of 2003.

³²⁵ Section 11 (2) (b) of the BBBEE Act 53 of 2003.

³²⁶ Osode (n 3) 117.

³²⁷ *Ibid.*

³²⁸ Burger et al ‘Black Economic Empowerment: A Review of the impact of funding structures on sustainable BEE transactions’ (2003) *MBA Thesis: The Graduate School of Business University of Cape Town* 9 and Osode (n 3) 117

³²⁸ Act 53 of 2003.

³²⁹ Osode (n 3) 117.

The Strategy Document³³⁰ and state practice reveal that the government has proceeded on the understanding that it is legally obliged to source funds from both the public and private sector.³³¹ With the DTI as co-coordinator, some mechanisms have been set up to ensure financing of BEE for example, the Industrial Development Corporation (IDC),³³² Khula Enterprise Finance,³³³ the National Empowerment Fund (NEF),³³⁴ the Development Bank of Southern Africa (DBSA),³³⁵ the Public Investment Commissioners (PIC),³³⁶ Ntsika Enterprise Promotion Agency, the Isibaya and Umsombomvu funds.³³⁷

³³⁰ A Strategy for Broad-Based Black Economic Empowerment: < www.dti.gov.za/bec.htm > (Accessed 06/07/2006).

³³¹ Osode (n 3) 117.

³³² The IDC 'is a self-financing, state-owned development finance institution with the mandate to be the driving force of commercially sustainable industrial development and innovation, to the benefit of South Africa and the rest of the African continent. The IDC's Empowerment Strategic Business Unit (SBU) and the Wholesale and Bridging Financing Unit are almost exclusively dedicated to financing historically disadvantaged entrepreneurs and contributing to the rapid advancement of empowerment. Investments realised by means of the Risk Capital Facility (RCF) are also aimed at broad-based empowerment initiatives and facilitating development initiatives in rural areas. The key challenge facing the IDC is the growth of the SMME sector to stimulate sustainable development and encourage greater equity in the economy'. (Fubu 'Financial Development initiative: role and future perspectives' (2003) *Business Map, Empowerment 2003: State and Market Initiatives Gain Momentum* 40-45).

³³³ 'Khula Enterprise Finance Limited is an agency of the DTI, established in 1996 to facilitate access to credit for SMME's through various delivery mechanisms. These include commercial banks, retail financial intermediaries (RFI's) and micro credit outlets (MCOs). Khula also provides mentorship services to guide and counsel entrepreneurs in various aspects of managing a business. Khula is a wholesale finance institution, which means that entrepreneurs do not get assistance directly from Khula but through various institutions'. Khula 2003 cited in Burger (n 328) 21-22.

³³⁴ 'The main objective of the NEF Corporation is to facilitate the redressing of economic inequality, which resulted from the past unfair discrimination against historically disadvantaged persons. It aims to do this by:

- Providing historically disadvantaged persons with the opportunity of, directly or indirectly, acquiring shares of interest in the State Owned Commercial Enterprises that are being restructured, or in private business enterprises.
- Encouraging and promoting savings, investments and meaningful economic participation by historically disadvantaged persons.
- Promoting and supporting business ventures pioneered and run by historically disadvantaged persons.
- Promoting the universal understanding of equity ownership among historically disadvantaged persons
- Encouraging the development of a competitive and effective equities market inclusive of all persons in the Republic.
- Contributing to the creation of employment opportunities'. NEF 2003 as cited in Burger (n 328) 21-22 and (Mthombo I.T Services Pamphlet (2005) *Brainstorm* unnumbered).

³³⁵ The DBSA's 'key purpose is to address socio-economic imbalances and help improve the quality of life of the people of South Africa. The core business of the DBSA is the financial and facilitative support for the creation of infrastructure. In addition to the primary focus on infrastructure, the DBSA also attends to short-and medium-term rural finance requirements'.

More comprehensively its mandate is to:

- Invest in infrastructure and facilitate the provision of infrastructure development finance.
- Finance sustainable development in partnership with the public and private sectors.
- Respond to development demands and act as a catalyst for investment.

(Fubu 'Financial Development initiative: role and future perspectives' *Business Map, Empowerment 2003: State and Market Initiatives Gain Momentum* 43).

³³⁶ 'The PIC is responsible for the administration and investment of public sector pension and provident funds. (Fubu 'Financial Development initiative: role and future perspectives' *Business Map, Empowerment 2003: State and Market Initiatives Gain Momentum* 40-45).

³³⁷ Osode (n 3) 117.

It is submitted that the high-liquidity of financial institutions renders the financial sector an ideal BEE financier.³³⁸ Contributions by the sector would not only facilitate BEE, but would make good business sense in light of the points that entities could earn for the ‘enterprise development’ element of the Scorecard. To date, the finance sector has shown some initiative in this regard as illustrated in Table 2 below.

Table 2: BEE FACILLITATION VEHICLES³³⁹

INSTITUTION	PURPOSE OF FUND	BEE FACILLITATION VEHICLES
Sanlam Development Fund	The Development Fund makes it possible for institutional investors and retirement funds to contribute towards growth and reconstruction, and the more equitable distribution of economic benefits, whilst earning yield concomitant to the development risk of the investment.	<ul style="list-style-type: none"> • Large infrastructure projects, through public/private partnerships. • Urban infrastructure projects, through structured finance deals. • Small and medium business and housing projects, through investing in retail intermediaries. • Unlisted financing vehicles supporting economic empowerment of previously disadvantaged groups. • Private equity funds with development focus.
Metropolitan Life Futurebuilder Funds	Futurebuilder offers the investor an opportunity to contribute to the development of the country and to support projects, which contribute towards improved economic growth and social stability. Futurebuilder aims to obtain consistently high real returns for its clients.	<ul style="list-style-type: none"> • Trident Institute-Basic business skills development, through provision of seed capital and financial support. • Small business development, through provision of start up loans. • Private unlisted financing vehicles supporting economic empowerment of previously disadvantaged individuals or groups. • Infrastructure development, through private sector investments.

³³⁸ Morar ‘ An analysis of Black Economic Empowerment (BEE): Is BEE facilitated being facilitated by the financial service sector?’ (1998) *MBA Thesis: The Graduate School of Business, University of Cape Town* 14.

³³⁹ Table extracted from Morar (n 338) 14 and 16.

The Brenthurst Initiative (The Initiative)³⁴⁰ has suggested additional sources of funding that include nurturing basic black-owned equity through tax friendly Employee Share Option Programmes (ESOPs) or requiring mandatory levels of savings.³⁴¹ The Initiative also suggests devising incentives to encourage not only individuals to invest in BEE companies, but also companies to provide ‘special purpose financing instruments’.³⁴²

6.2.1.2 Section 38 of the Companies Act

It has been argued that vendor financing is a particularly viable financing option.³⁴³ The problem with this suggestion is that it stands in potential contravention of the Companies Act.³⁴⁴ Section 38 provides that

No company shall give, whether directly or indirectly by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose or in connection with a purchase or subscription made or to be made by any person of or for any shares of the company, or where the company is a subsidiary, of its holding company.³⁴⁵

When companies enter into a BEE transaction aimed at transferring ownership and control to a BEE enterprise through the acquisition of shares by the BEE company, in many instances these companies will look to facilitate the purchase of its shares.³⁴⁶ The problem is that s 38 precludes the company from financing the BEE enterprise’s share purchase, which in most circumstances would be the most viable financing option.³⁴⁷ The consequences of non-compliance with s 38 are that the transaction will be deemed void and the directors and the company will be guilty of an offence.³⁴⁸ Furthermore, such a contravention cannot be

³⁴⁰ The Brenthurst Initiative ‘is an initiative created by the Oppenheimer family and publicized in 2003. It is a forum to openly discuss issues surrounding the transformation and economic advancement of South Africa. It specifically looks to address three key challenges:

- Transformation requirements on a national scale, thereby providing investors with certainty as a result of clear, realistic targets for transformation.
- The creation of investment incentives, that are linked to transformation performance
- The closing of the BEE funding gap. (Burger (n 328) 24.)

³⁴¹ This was the method adopted in Australia and in Chile. (Burger (n 328)24.)

³⁴² Burger (n 328) 24.

³⁴³ Desi ‘A Case Study on New South Africa Investment Limited and Black Economic Empowerment Funding Mechanisms in The New South Africa’ (1998) *MBA Thesis: The Graduate School of Business University of Cape Town* 48.

In terms of a vendor financing scheme, the company selling the equity, finances the purchase of shares. The benefit of this scheme is that it eliminates ‘the middle man’ and reduces many finance costs. (Desi (n 343) 48.)

³⁴⁴ Companies Act 61 of 1973.

³⁴⁵ Section 38 (1) of the Companies Act 61 of 1973.

³⁴⁶ Van der Merwe (n 90) 32.

³⁴⁷ *Ibid.*

³⁴⁸ S 38 (1) of the Companies Act 61 of 1973.

cured by shareholder, creditor or court approval.³⁴⁹ It is clear that s 38 poses an almost insurmountable challenge to the financing of BEE.

A possible way to avoid contravening the section is through the use of Special Purpose Vehicles (SPVs) - the BEE company acquires shares through a SPV, and an external financier provides the SPV with the necessary funds for the purchase of the shares.³⁵⁰ The BEE partner will then be required by the financier to furnish as security for the SPV's obligations, its shareholding in the SPV,³⁵¹ thus increasing the risks and costs of the transaction for the BEE company.³⁵² Furthermore, these deals are highly leveraged with success depending largely on market performance of share prices,³⁵³ which results in unsustainable transactions.³⁵⁴

An alternative to SPV's is the use of 'deferred shares'.³⁵⁵ This would be in line with the rationale underlying the Malaysian strategy of issuing no-par value shares,³⁵⁶ which is essentially to bring increased equity within the range of beneficiary groups at a lower cost than ordinary shares, thus rendering them cheaper and more accessible.³⁵⁷ Furthermore, the issue of deferred shares would tend to increase investor confidence.³⁵⁸ The disadvantage with deferred shares however is that benefits derived from them are deferred benefits.³⁵⁹ Nevertheless the issue of deferred shares may prove valuable if they mature into something more, which may happen if BEE companies prove themselves as productive entities. This in turn would have a knock-on benefit of increased value addition to the economy.

³⁴⁹ Davids 'The Black Economic Empowerment Phenomenon' at <http://www.bowman.co.za/Law - Article.asp?id=-1037871731> (Accessed on 16/04/2006).

³⁵⁰ Van der Merwe (n 90) 32.

³⁵¹ *Ibid.*

³⁵² *Ibid.*

³⁵³ 'Move to Company-facilitated transactions is paying off' at <http://www.realbusiness.co.za/Article.aspx?articleID=3574&TypeID=9> (accessed on 25/03/06).

³⁵⁴ *Ibid.*

³⁵⁵ With deferred shares, shareholder rights to dividends are deferred until preference shareholders and ordinary shareholders have received their dividend entitlement. These shares may or may not carry different voting rights. Interview with Mr Graham Bradfield, Commercial Law lecturer, University of Cape Town, South Africa. Interview conducted on 16/09/05.

³⁵⁶ Sowell (n 33) 61.

³⁵⁷ Interview with Mr Graham Bradfield, Commercial Law lecturer, University of Cape Town, South Africa. Interview conducted on 16/09/05.

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid.*

Recently Companies have moved to engineering innovative and complex financing structures to overcome the s 38 obstacle. An example of such an elaborate structure is the 2006 Standard Bank deal which has been hailed as one of the largest BEE deals to date.³⁶⁰ The Standard Bank deal comprised two stages.³⁶¹ First, Standard Bank issued ordinary shares to its wholly owned subsidiary and financed the purchase of these shares by this SPV through a subscription of preference shares in the SPV. The second stage of the transaction involved the sale of the Standard Bank ordinary shares held by the SPV to a number of BEE investors at a nominal value.³⁶² This nominal price brought the shares within affordable range and meant that the BEE entities were able to self-fund this purchase without relying on vendor finance, which stands to contravene s 38. The argument is that this transaction does not amount to a breach of s 38 because of its two tiered nature- the first part falling into the s 38 (2) (d) exemption,³⁶³ and there having been no financial assistance to any party in the second part.

It is submitted that the transaction should be viewed as the sum of its parts. When so viewed, the transaction does in fact amount to a contravention of s 38 as Standard Bank has *in fact* provided financial assistance for the subscription of its own shares, notwithstanding the use of the SPV as a conduit. Despite this generally accepted view on the ‘illegality’ of the Standard Bank deal, there has been a tendency to turn a blind eye to such s 38 breaches in light of the hindrance it poses to BEE progress. In the final instance, as creative as such structures are, they are extremely complex, expensive to implement,³⁶⁴ and considerable tax implications are usually associated with such arrangements.³⁶⁵

Whichever way it is viewed, s 38 is highly problematic and needs to be amended with a view to achieving a balance between the ‘share buy-back provisions and associated capital adequacy rules in terms of the Companies Act’ and ‘the need to facilitate BEE’.³⁶⁶ It has been suggested that the general prohibition on financial assistance be maintained with the

³⁶⁰ Davids (n 349).

³⁶¹ Details of the structure of the Standard Bank deal obtained from an Interview with Adam Ismail, partner of Sonnenberg Hoffmann Galombik Attorneys. Interview conducted on 13/03/06.

³⁶² Davids (n 349).

³⁶³ Section 38 (2) (d) of the Companies Act 61 of 1973 provides: ‘The provisions of subsection (1) shall not be construed as prohibiting...the provision of financial assistance for the acquisition of shares in a company by the company or its subsidiary in accordance with the provisions of section 85 for the acquisition of shares’.

³⁶⁴ Davids (n 349).

³⁶⁵ *Ibid.*

³⁶⁶ Van der Merwe (n 90) 33.

amendment taking the form of an additional exemption that deals with empowerment transactions and details capital maintenance requirements in the form of provisos.³⁶⁷ The Corporate Laws Amendment Bill, to be enacted in early 2007, adopts a more commendable alternative providing that companies are *not* prohibited from ‘giving financial assistance for the purchase of or subscription of shares of that company or its holding company’,³⁶⁸ provided the solvency and liquidity requirements are met.³⁶⁹ It is submitted that the ‘solvency and liquidity’ test is preferable as it is less cumbersome and more flexible than the ‘exemption and proviso’ construction.

6.2.1.3 Sustainability of BEE Transactions

A major problem that arises in the field of financing is the effect of funding structures on the sustainability of BEE transactions. The reliance on erratic share prices as a gauge of performance often presents a distorted picture of BEE progress,³⁷⁰ and hinders BEE companies from undertaking strategic long-term planning thus increasing the risk of economic failure.³⁷¹ A further problem is that the indebtedness of BEE entities means that economic benefits tend to lie in the hands of the financier, as opposed to adding economic value to the BEE partners.³⁷²

It is suggested that deals be structured with sustainability as the primary focus. Where debt finance is used, a key ingredient for success is the funding of empowerment transactions by use of long term debt (5 to 12 year time horizon) as opposed to short repayment periods of between 3 to 5 years.³⁷³ This would give the BEE partner a chance to establish itself, instead of being shackled by onerous debt repayment obligations in the early years of operation. The

³⁶⁷ ‘Empowerment finance hurdles can be lowered’ *Business Day* August 19 2005 at 13.

³⁶⁸ Section 9 of the Corporate Laws Amendment Bill: Amendment of s38 of Act 61 of 1973.

³⁶⁹ Corporate Laws Amendment Bill: Amendment of s38 of Act 61 of 1973. Section 9 provides: ‘Section 38 of the Companies Act is hereby amended by the insertion after subsection (2) of the following sub-sections: ‘(2A) Subsection (1) does not prohibit a company from giving financial assistance for the purchase of or subscription for shares of that company or its holding company, if-

(a) the company’s board is satisfied that-

(i) subsequent to the transaction, the consolidated assets of the company fairly valued will be more than its consolidated liabilities; and

(ii) subsequent to providing the assistance, and for the duration of the transaction, the company will be able to pay its debts as they become due in the ordinary course of business; and

(b) the terms upon which the assistance is to be given is sanctioned by a special resolution of members.

(2B) For the purposes of paragraph (2A)(a), the directors must account for any contingent liabilities which may arise to the company, including any contingent liability which may result from giving the assistance’.

³⁷⁰ Burger (n 328) 10.

³⁷¹ *Ibid.*

³⁷² Burger (n 328) 57.

³⁷³ Burger (n 328) 58.

Afrikaner model, devised by Sanlam, is a viable empowerment structure, as the pooling of personal savings through intermediaries results in long-term asset growth.³⁷⁴ Ultimately economic growth is the key driver in ensuring sustainability, and government therefore needs to adopt measures that encourage such growth.³⁷⁵

6.2.1.4 Conclusion on financing

As is apparent from the above, the financing of BEE poses many significant challenges to the BEE enterprise, however, as illustrated by the recommendations proffered above, these challenges are not insurmountable. The same is true for many aspects of BEE as will become evident in the discussion to follow that deals with the broadness of broad-based BEE.

6.2.2 Broad-Based BEE: The Breadth of the Matter

6.2.2.1 Defining the Ambit of BEE

A crucial issue is how far the arms of empowerment are to reach. BEE, viewed from a benevolent perspective, can be regarded as a move to ensure transformation that will improve ‘the lives of all South Africans’.³⁷⁶ A contrary perspective would be to regard BEE as an initiative directed towards the creation of a critical mass of Black middle class.³⁷⁷ The latter approach appears to be more realistically attainable, where a focus on expanding ownership through equity transfer and increasing levels of management control³⁷⁸ is easier to facilitate, as is reflected by the tendency of SA businesses to empower via these channels.³⁷⁹ Furthermore, this narrow approach to empowerment is a trend reflected in the long-standing and relatively successful economic empowerment approach adopted in Malaysia.³⁸⁰

It is clear from the Generic Scorecard however, that BEE is intended to extend further than equity ownership and management, and is to include employment equity, skills development, preferential procurement, enterprise development and corporate social development. Out of a possible 100 points that can be scored, 70 of those points are directed towards a broad-base of Black people, including employees, workers with minimal or no

³⁷⁴ Burger (n 328) 58.

³⁷⁵ Burger (n 328) 67.

³⁷⁶ Kennedy (n 244) 45.

³⁷⁷ Shubane (n 250) 15.

³⁷⁸ Balshaw (n 123) 89 and Shubane (n 250) 15.

³⁷⁹ ‘Black Economic Empowerment: Focus on a broad-based philosophy’ (May 2005) *BusinessDay Survey* at 7.

³⁸⁰ Sowell (n 33) 61 Manning (n 38) 24.

skills, entrepreneurs, Small to Medium and Micro-Enterprises (SMME's) and rural communities.³⁸¹ BEE is clearly intended to be an all-inclusive enterprise serving to empower a broad spectrum of the black population, however, several factors thwart this vision. This paper will canvass two of the most glaring of these factors, namely 'elite bias' and skills development.

6.2.2.2. 'Elite Bias'

The first wave of BEE, as identified by the South African Advertising Research Foundation (SAARF),³⁸² seems to have afforded benefits to only a few people, particularly businessmen within the ANC,³⁸³ creating a 'new Black bourgeoisie'.³⁸⁴ This elite bias is not unique to SA however, as preferences in Malaysia stood primarily to benefit coalition members, their relatives and those who were already privileged.³⁸⁵ Similarly, preferential policies in the US have largely benefited the already wealthy members of the minority grouping,³⁸⁶ with little empowerment reaching lower levels of intended beneficiaries.³⁸⁷ It has been suggested that a solution to the SA dilemma would be the imposition of BEE transaction restrictions which would limit the total number of BEE transactions that any individual beneficiary can conclude.³⁸⁸

The second wave of BEE has seen the rise of young upcoming black professionals termed 'buppies', with the third wave characterized by 'buppies' - 'booming, aspirational and previously poor' entrepreneurs.³⁸⁹ It is hoped that the fourth wave will be characterized by increased skills deployment and rural community upliftment, however, these factors are prone to incremental implementation.³⁹⁰ It is submitted that companies use their initiative to design means that will expedite the achievement of the broad-based goal, and a feasible

³⁸¹ Safi 'How Broad is Broad-Based Black Economic Empowerment: A critical Analysis of the Challenges facing BEE' Unpublished LLB Mini-Dissertation, University of Cape Town (2006) at 39.

³⁸² 'The Emerging Black Middle Class-True Black Economic Empowerment?' at www.sagoodnews.co.za/newsletter/previous_newsletters/24June2005.htm (Accessed on 23/09/2006).

³⁸³ 'Is South African Black Economic Empowerment A Mining Myth?' at <http://www.minesandcommunities.org/Action/press435.htm> (Accessed on 23/04/2005).

³⁸⁴ Osode (n 3) 107 and Kennedy (n 244) 32.

³⁸⁵ Sowell (n 33) 62.

³⁸⁶ Sowell (n 33) 120 also see Nesiah, D *Discrimination with Reason?: The Policy of Reservations in the United States, India and Malaysia*. 30 & 32.

³⁸⁷ Nesiah *Discrimination with Reason?: The Policy of Reservations in the United States, India and Malaysia*. 32.

³⁸⁸ Osode (n 3) 119.

³⁸⁹ 'The Emerging Black Middle Class-True Black Economic Empowerment?' (n 382).

³⁹⁰ Balshaw (n 123) 89.

starting point would be to focus on the critical issue of skills development, which is essential for sustainable economic empowerment.

6.2.2.3 Skills Development

There is a dire need to develop broad-based skills in SA.³⁹¹ Inadequate skill transfer results in the consequent inability of Black managers and entrepreneurs to manage capital assets thus extending undue reliance on previously advantaged partners.³⁹² Furthermore, inadequate human resource development may disadvantage South Africa's competitive standing in the global markets.³⁹³ Skills transfer is thus crucial to ensuring effective empowerment.

C400S400 governs skill development,³⁹⁴ and enterprises can earn up to 20 points depending on, *inter alia*, the level of 'skills development spend' on 'critical and/or core skills for black employees' and on learnerships administered by Sector Education Training Authorities (SETAs).³⁹⁵ This Code is buttressed by, and is compatible with, the Skills Development Act (SDA)³⁹⁶ and their combination provides an excellent framework for skill deployment. The problem rests in the implementation, where apathy together with resource shortages hamper action. A proposed practical solution for facilitating skill empowerment is for each sector to focus on developing skills within their respective sectors. Such a move is apparent in the ICT sector, where the Black Information Technology Forum (BITF)³⁹⁷ has assumed a lead role in skills deployment,³⁹⁸ which is proving to be successful.³⁹⁹ Sector

³⁹¹ Woolley (n 82) 69.

³⁹² Kennedy (n 244) 45.

³⁹³ *Ibid.*

³⁹⁴ C400S400 of 2005 Department of Trade and Industry (Phase Two 2005 Codes) Code 400: 'Measurement of the Skills Development Element of the Broad-Based Black Economic Empowerment : Statement 400 'The Recognition of Skills Development and Organisational Transformation Contributions to Black Economic Empowerment at para 5 at www.dti.gov.za (Accessed on 19 of December 2006).

³⁹⁵ C400S400 of 2005 (n 394) para 5.

³⁹⁶ Skills Development Act 97 of 1998 and C400S4000 of 2005 (n 394) para 7 and Balshaw (n 123) 125.

³⁹⁷ The BITF is a voluntary association that was established in 1995. It comprises black entrepreneurs and professionals within the ICT industry. ('Blueprint For Black Economic Empowerment' (2000) *IT Training* Issue 2 at 6.)

³⁹⁸ 'Blueprint For Black Economic Empowerment' (2000) *IT Training* Issue 2 at 6.

The BITF has instituted a skills development programme which covers *inter alia*, technical and business training, sales, marketing and mentorship programmes. 'The BITF believes that by pooling resources, and with support of major corporate industries, it will be possible to create a development infrastructure that will revolutionise the level of black participation within the IT industry'. ('Blueprint For Black Economic Empowerment' (2000) *IT Training* Issue 2 at 7.)

³⁹⁹ This success is apparent in that major players in the ICT industry have committed their support to the accredited members of the BITF Institute. These major players include, Datatec, Microsoft, and Novell SA. ('Blueprint For Black Economic Empowerment' (2000) *IT Training* Issue 2 at 6 & 7)

oriented skills development⁴⁰⁰ has the advantage of being able to pool resources towards focusing on skills specifically required in the respective sectors. It is submitted that the Codes should be the instrument mandating this initiative, and that by failing to mention this, or other such collaborative resource mobilisation schemes, the Codes fall short.

6.2.2.4 Conclusion on Broad-based BEE

As noted, the fact that empowerment is to be broad-based is undisputed however, the lived realities reflect a divergence from this goal. The primary responsibility rests on the shoulders of the Minister of Trade and Industry and the BEE Advisory Council to pursue ‘outcomes-based implementation’ of both the Act and the Codes, in order to ensure that broad-based BEE becomes a reality in South Africa.⁴⁰¹ Private entities too have a part to play though, as by broadening their perspective on the empowerment aim, considering not only return on investment but also the broader BEE ideology, they assist in making broad-based BEE tangible. A factor that serves as a barrier to not only the broad-based pursuit, but also to the BEE initiative in general, is the prevalent occurrence of fronting which limits the prospects of sustainable⁴⁰² empowerment. The next part of this paper will elaborate further.

6.2.3 Fraudulence: The Fronting Barrier

Fronting is in essence ‘tokenism [or the] superficial inclusion of historically disadvantaged individuals’,⁴⁰³ with no actual transfer of wealth or control.⁴⁰⁴ It is a cynical manipulation of regulatory requirements that amounts to defrauding the government, and defeats the aims of BEE.⁴⁰⁵ Fronting is most commonly understood as ‘window dressing’ which involves either promoting inexperienced and unskilled Black people to senior managerial positions, or employing Black people without providing them with any work to

⁴⁰⁰ Such development should include the use of learnerships, (which are programs where ‘you learn while you work’) (Woolley (n 82) 12.) Furthermore, professional management skills can be transferred to black managers through a process of mentoring. Such mentoring ensures ‘intellectual empowerment’ and enables black managers to manage the assets under their charge. (Kennedy (n 244) 39.)

⁴⁰¹ Osode (n 3) 120.

⁴⁰² Pinnock ‘The ins and outs of structuring deals in South Africa’ <http://www.cliffedekker.co.za/literature/pets/index.htm> (Accessed on 16/05/06).

⁴⁰³ ‘What is Fronting?’ August 2004 at http://www.foundation-development-africa.org/afica_black_business/fronting.htm (Accessed on 19/08/2005). Originally at <http://www.capegateway.gov.za>

⁴⁰⁴ Singh (n 140) 19.

⁴⁰⁵ Sigau guns for BEE ‘wolves’ in The Mercury Business Report: <http://www.themercury.co.za/index.php?fSEctionId=282&fArticleId=2814616> (Accessed on 19/08/2005).

do.⁴⁰⁶ All this is done with a view to appearing to be BEE compliant. More insidious fronting forms include, but are not limited to, what are termed ‘fronts on paper’,⁴⁰⁷ ‘fictitious companies’,⁴⁰⁸ ‘fronts in joint ventures’,⁴⁰⁹ and lastly ‘front companies’.⁴¹⁰ This paper will be limited to a discussion of ‘Front Companies’ as this is particularly prevalent in both Malaysia and the US, the comparative schemes addressed above.

Front companies misrepresent their status as empowerment companies in an endeavour to gain preferential benefits⁴¹¹ and thus disadvantage authentic entities.⁴¹² In Malaysia these are termed ‘Ali Baba’ enterprises where Malays (Ali) are the face of what are in reality Chinese (Baba) owned companies.⁴¹³ Similarly in SA, a frequent occurrence in the construction industry is for contracts awarded to BEE companies to be sub-contracted to white owned enterprises, where ‘all white minority shareholders in the BEE company are in fact majority shareholders in the white company’.⁴¹⁴ The impact of fronting is apparent from the probe by the Department of Trade and Works in August 2005,⁴¹⁵ which revealed an estimated loss of R 4441,1 million from fronting scams.⁴¹⁶ In the US similar frauds were perpetrated by Tyco Manufacturing and ‘Automated Data Management’, which were both companies masquerading as minority entities to gain preferences.⁴¹⁷ What this pattern

⁴⁰⁶ *Ibid.*

⁴⁰⁷ ‘Fronts on paper’: The documents are legitimate, but the ‘owners’ are unaware of being shareholders, have no control in the company and do not manage any aspect of the company’. (Moloi ‘Combating Corruption and Fronting’ (Dec/Jan 2006) *Government: Building Women* 32).

⁴⁰⁸ ‘Fictitious Companies’: are established for the benefit of procuring contracts and on the ground fees accrue to a white company which does all the work. (Statement by Minister of Public Work Ms Stella Sigcau on the findings of a probe on the extent of fronting in the construction industry at <http://www.info.gov.za/speechless/2005/05080512151001.htm> (Accessed on 19/08/2005)).

⁴⁰⁹ ‘Fronts in Joint Ventures’: involve joint ventures being formed between non-BEE contractors and BEE contractors for a specific project in terms of which the BEE company has no responsibilities or control over the project. (Statement by Minister of Public Work Ms Stella Sigcau on the findings of a probe on the extent of fronting in the construction industry at <http://www.info.gov.za/speechless/2005/05080512151001.htm> (Accessed on 19/08/2005)).

⁴¹⁰ Moloi ‘Combating Corruption and Fronting’ (Dec/Jan 2006) *Government: Building Women* 32.

⁴¹¹ Statement by Minister of Public Work Ms Stella Sigcau on the findings of a probe on the extent of fronting in the construction industry at <http://www.info.gov.za/speechless/2005/05080512151001.htm> (Accessed on 19/08/2005)

⁴¹² Start Up Journal, The Wall Street Journal ‘New “Minority” Definition Splits Black Owners’ at <http://startup.wsj.com/howto/minorityissues/200002170915-wynter.html> (Accessed on 05/02/07).

⁴¹³ Sowell (n 3) 137.

⁴¹⁴ Moloi (n 410) 32.

⁴¹⁵ Ntuli ‘Government Gets Tough on BEE Fronting’ (August 2005) at http://safrica.info/doing_business/trends/empowerment/bee-public-works-030805htm. (Accessed on 19 August 2005).

⁴¹⁶ Statement by Minister of Public Work Ms Stella Sigcau (n 411). Also see Masondo, S ‘Fronting costing taxpayers millions’ at <http://www.netassets.co.za/include/dynamicContentDEtailPrint.asp?websiteContentIte> (Accessed on 19/08/2005).

⁴¹⁷ Lewis (n 59).

reveals is that this form of fraud seems to be inextricable from empowerment programmes, and the question then turns to what preventative measures are available.

C000S001⁴¹⁸ is specifically geared toward combating fronting. Verification Agencies are to play a central role in this exercise and are responsible for identifying ‘Fronting Risk Indicators’,⁴¹⁹ determining fronting scores,⁴²⁰ and reporting on their findings.⁴²¹ Similarly, the US system relies on certification and accreditation audits as a preventative measure.⁴²²

Any entity that engages in fronting practices stands to be prosecuted as fronting amounts to fraud and as such it is a criminal offence.⁴²³ Should such a company be ‘found guilty of fraud or misrepresentation...[it] and its directors may be black listed’ in terms of C000S001 para 10.5.⁴²⁴ A further misfortune that will befall such miscreant companies is that any contracts entered into are voidable.⁴²⁵

6.2.3.1 Conclusion on Fronting

The fronting barrier needs to be broken through if BEE is to have any hope of success. This cynical manipulation of the regulatory framework results from a microscopic attitude towards BEE. Attitude is a crucial aspect in determining the direction that BEE will take, and this paper will now turn to consider certain attitudes that may misdirect the enterprise.

⁴¹⁸ C000S001 of 2005: Department of Trade and Industry (Phase Two 2005 Codes) Code 000 ‘Framework for the Measurement of Broad-Based Black Economic Empowerment : Statement 001 ‘Fronting Practices and Other Misrepresentation of BEE Status at www.dti.gov.za (Accessed on 29/01/07)5

⁴¹⁹ ‘Indicators of Fronting risk may be either high-risk or moderate risk in nature’. (C000S001 of 2005 (n 418) para 7).

For an enumeration of these indicators, see C000S001 of 2005 (n 418) para 7.2 & para 7.3

⁴²⁰ See C000S001 of 2005 (n 418) para 10. ‘The fronting risk indicators will allow Verification Agencies...to classify Enterprises according to four different levels of Fronting Status...namely :10.4.1 Fraud; 10.4.2 Excessive Fronting risk; 10.4.3 High Fronting risk; 10.4.4 Low Fronting Risk’.

⁴²¹ See C000S001 of 2005 (n 418) paras 7; 8 ; 9 & 10.

⁴²² Lewis (n 59).

⁴²³ Daly ‘A Recipe for Woe’ in Black Economic Empowerment (May 2003) *Business Day Survey* at 8 and Moloi (n 410)32.

⁴²⁴ C000S001 of 2005 (n 418) at para 10.5.

⁴²⁵ Daly (n 423) 8 and Moloi (n 410) 33.

6.2.4. Attitudinal Constraints: ‘A Culture of Entitlement’ and ‘A Culture of Resentment’

Certain attitudes hinder true transformation and may even go so far as to nurture a hostile environment. One such attitude is the growing ‘culture of entitlement’,⁴²⁶ amongst previously disadvantaged groups, which is also a mindset evident in the Malay population.⁴²⁷ Groups feel that because benefits are assured they are not compelled to perform.⁴²⁸ This in turn may generate a ‘culture of resentment’ amongst previously advantaged groups who leave the country (resulting in ‘brain drain’),⁴²⁹ resist the philosophy, or simply become disillusioned.⁴³⁰ In the US, frustration is evidenced by the numerous preferential schemes that have been constitutionally challenged,⁴³¹ and more dramatically, by spates of violence as a result of ‘public racial intolerance’.⁴³²

In terms of redress, the Malaysian government dealt with public intolerance by instituting several laws aimed at limiting free speech,⁴³³ however, this solution is untenable in a democratic South Africa. The recommended manner to counter these attitudinal constraints is to nurture a ‘culture of mutual understanding’. This can be facilitated through open dialogues and other such forums. Furthermore, educating the nation on the real need for BEE, the co-operation required for its success, and the knock on benefits for the economy, will assist in broadening myopic vision. Although not an ideal method, a constant reminder that BEE is not intended to be an indefinite enterprise⁴³⁴ could possibly jolt those who feel entitled into real action, while contemporaneously providing those who feel disadvantaged with a sense of eventual respite.

⁴²⁶ Kennedy (n 244) 32.

⁴²⁷ ‘The Malaysian Prime Minister, Mahatir bin Mahomed, one of the advocates and architects of the country’s affirmative action policies, said in August 2002:...[receiving preferences] is considered a matter of right and is not valued anymore...they don’t seem to appreciate the opportunities that they get...they learn nothing about business and become even less capable of doing business and earning an income from their activities...I feel disappointed because I achieved too little in my principal task of making my race a successful race, a race that is respected.’ Sowell (n 33) 74-75.

⁴²⁸ Sowell (n 33) 74.

⁴²⁹ Janisch ‘Returning Expats and the Future of South Africa’ (15 January 2007) at <http://www.entrepreneur.co.za/BEE/home.aspx> (Accessed on 29/01/07).

⁴³⁰ Sowell (n 33) 14 & 187 and Safi (n 381) 48.

⁴³¹ Sweet (n 71) 162-164.

⁴³² Encarta (n 56). Also see Nesiah (n 387) 33.

⁴³³ Galenson *Labour and Economic Growth in Five Asian Countries: South Korea, Malaysia, Taiwan, Thailand, and the Philippines* 18. See also Sowell (n 33) 60 and 76.

⁴³⁴ Balshaw (n 123) 86 also see C00S000 of 2005 (n 112) para 11. In terms of this paragraph, the Codes are set to run for a period of 10 years, and will be reviewed at the end of this period with the chance that they may be renewed.

6.3 CONCLUSION ON THE CHALLENGES

This subsection of the paper has illustrated the general kinds of challenges that face BEE. It is clear that BEE still has a long way to go in ironing out these problems that stand to thwart the entire initiative.

7. CONCLUSION: THE FINAL WORD

The aim of this paper has been to assess the BEE regulatory framework and to critically discuss the challenges facing the BEE drive. This undertaking involved an introduction of the BEE philosophy couched within both a historical and international context. The paper then highlighted the comprehensive and yet complex regulatory framework governing BEE, and the crux of the paper elucidated the current challenges hindering BEE implementation. It is the conclusion of this paper that BEE, as a work in progress, has made marginal strides and has the potential to ensure that a broad base of intended beneficiaries are empowered. However, should the challenges outlined in this paper not be overcome, the empowerment goal may be elusive. As this paper illustrates, these hurdles are not insurmountable and with dedication and ingenuity, BEE has the potential to be one of the most successful empowerment strategies the world over.

8. APPENDICES

8.1 APPENDIX 1: THE BEE CODES OF GOOD PRACTICE

THE PHASE ONE 2005 CODES

<i>CODE/Statement</i>	<i>Descriptions</i>	<i>Release Date</i>
CODE 000	Framework for the measurement of Broad Based Black Economic Empowerment	1 November 05
<u>Statement 000</u>	The Organisation of the Codes of Good Practice, the elements of Broad Based Black Economic Empowerment and the Generic Scorecard	1 November 05
<u>Statement 010</u>	Guidelines for the Development and Gazetting of Transformation Charters	1 November 05
<u>Statement 020</u>	The Approval, Accreditation and Regulation of BEE Verification Agencies	1 November 05
CODE 100	Measurement of the Ownership Element of Broad-Based Black Economic Empowerment	1 November 05
<u>Statement 100</u>	The General Ownership Scorecard and the Recognition of Ownership Arising from the Sale of Equity Instruments	1 November 05
<u>Statement 101</u>	The Recognition Of Ownership Contributions Arising From Sales Of Businesses/Assets In Qualifying Transactions	1 November 05
CODE 200	Measurement of the Management and Control Element of Broad-Based Black Economic Empowerment	1 November 05
<u>Statement 200</u>	The General Recognition of Management Control	1 November 05

Sourced from DTI website at <http://www.dti.gov.za/bee/2CODESOFGOODPRACTICE2005.htm> (Accessed on 12 February 2007).

THE PHASE TWO 2005 CODES

<i>CODE/Statement</i>	<i>Descriptions</i>	<i>Release Date</i>
CODE 000	Broad-Based Black Economic Empowerment Framework	20 December 05
<u>Statement 001</u>	Fronting practices and other misrepresentation of BEE status	20 December 05
<u>Statement 002</u>	Specific verifications issues relating to complex Structures	20 December 05
CODE 100	Measurement of the Ownership element of B-BBEE	20 December 05
<u>Statement 102</u>	The Recognition of Ownership Contributions arising from Investments by BEE Targeted Warehousing Funds	20 December 05
<u>Statement 103</u>	The Recognition of Ownership Contributions by Multinational Companies	20 December 05
<u>Statement 104</u>	The Recognition of Ownership Contributions made by Public Entities and Organs of the State	20 December 05
<u>Statement 105</u>	The Recognition of Ownership Contributions made by Companies limited by Guarantee and Section 21 Companies	20 December 05
CODE 300	Measurement of the Employment Equity Element of Broad-Based Black Economic Empowerment	20 December 05
<u>Statement 300</u>	The Recognition of Employment Equity Contributions	20 December 05
CODE 400	Measurement of the Skills Development Element of Broad-Based Black Economic Empowerment	20 December 05
<u>Statement 400</u>	The Recognition of Skills Development and Organisational Transformation Contributions to Black Economic Empowerment	20 December 05
CODE 500	Measurement of the Preferential Procurement Element of Broad-Based Black Economic Empowerment	20 December 05
<u>Statement 500</u>	The Recognition of Preferential Procurement Contributions	20 December 05
CODE 600	Measurement of the Enterprise Development Element of Broad-Based Black Economic Empowerment	20 December 05
<u>Statement 600</u>	The Recognition of Enterprise Development Contributions	20 December 05
CODE 700	Measurement of the Residual Element of Broad-Based Black Economic Empowerment	20 December 05
<u>Statement 700</u>	The Recognition of Residual Contributions	20 December 05

Sourced from DTI website at <http://www.dti.gov.za/bee/2NDPHASE.htm> (Accessed on 12 February 2007)

8.2 APPENDIX 2: CODES OF GOOD PRACTICE ON BROAD-BASED BEE FOR QUALIFYING SMALL ENTERPRISES

<i>CODE/Statement</i>	<i>Descriptions</i>	<i>Release Date</i>
CODE 1000	Framework for the Measurement of Broad-Based Black Economic Empowerment amongst Qualifying Small Enterprises	20 December 05
<u>Statement 1000</u>	The Organisation of the Codes of Good Practice pertaining to Qualifying Small Enterprises, The Elements of Broad-Based Black Economic Empowerment and the Qualifying Small Enterprise Scorecard	20 December 05
CODE 1100	Measurement of the Ownership Element for Qualifying Small Enterprises	20 December 05
<u>Statement 1100</u>	The General Ownership Scorecard and the Recognition of Ownership arising from the Sale of Equity Instruments for Qualifying Small Enterprises	20 December 05
CODE 1200	Measurement of the Management Control Element for Qualifying Small Enterprises	20 December 05
<u>Statement 1200</u>	The General Recognition of Management Control for Qualifying Small Enterprises	20 December 05
CODE 1300	Measurement of the Employment Equity Element for Qualifying Small Enterprises	20 December 05
<u>Statement 1300</u>	The Recognition of Employment Equity Contributions for Qualifying Small Enterprises	20 December 05
CODE 1400	Measurement of the Skills Development Element for Qualifying Small Enterprises	20 December 05
<u>Statement 1400</u>	The Recognition of Skills Development and Organisational Transformation Contributions for Qualifying Small Enterprises	20 December 05
CODE 1500	Measurement of the Preferential Procurement Element for Qualifying Small Enterprises	20 December 05
<u>Statement 1500</u>	The Recognition of Preferential Procurement Contributions for Qualifying Small Enterprises	20 December 05

CODE 1600	Measurement of the Enterprise Development Element for Qualifying Small Enterprises	20 December 05
Statement 1600	The Recognition of Enterprise Development Contributions for Qualifying Small Enterprises	20 December 05
CODE 1700	Measurement of the Residual Element for Qualifying Small Enterprises	20 December 05
Statement 1700	The Recognition of Residual Contributions for Qualifying Small Enterprises	20 December 05

Sourced from DTI website at <http://www.dti.gov.za/bee/2NDPHASE.htm> (Accessed on 12 February 2007)

8.3 APPENDIX 3: THE SECTOR TRANSFORMATION CHARTERS IN PERSPECTIVE

	MINING SECTOR	FINANCIAL SECTOR	ICT SECTOR (Final Draft Version 2005)
Characteristics	The mining industry is the longest standing industry in South Africa, and has in the past been funded by White capital and characterized by a Black majority of cheap labour.	The financial sector is central to the South African economy, and is a key financier in the BEE initiative. This sector has been characterized by a lack of Black equity holding, Black management and Black control.	The ICT sector is a fairly new sector in the South Africa economy and is a dynamic and fast-paced sector. Constraints limiting Black participation in the ICT sector are inadequate business skills, and difficulties in accessing capital on account of limited credit facilities available to Black businesses.
Vision of the Charter	To create a globally competitive mining industry that draws on the human and financial resources of all South Africans and [that] offer[s] real benefits to all South Africans [in an endeavour to reach the charter goal of a] non-racial South Africa, through equity transfer and skills development.	To actively promote a transformed, vibrant, and globally competitive financial sector that reflects the demographics of South Africa, and contributes to the establishment of an equitable society' through the pursuit of sustainable growth combined with skills and asset base development.	To promote effective implementation of the BBBEE Act in the ICT sector, as well Bridge the "digital divide" by actively promoting access to ICT's . Further to contribute towards the reduction of unemployment and poverty alleviation as well as to support skills development, training initiatives and the fostering of equity.
Intended Beneficiaries	Historically Disadvantaged South Africans (HDSA) refers to any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) came into operation.	All black people, including women, workers, youth, people with disabilities and people living in rural areas Black people means all Africans, Coloureds and Indians who are South African citizens and includes black companies. However, in paragraphs 5 and 11 the term shall include permanent residents of the Republic of South Africa. The word "black" when used in conjunction with other words shall have the same implications.	All black people, including black women, workers, youth, people with disabilities and people living in rural areas

Equity Target (Ownership and Control)	26% by 2012. Considers active and passive involvement.	<u>Ownership</u> : 25% Black ownership at holding company level is set for 2010; 10% direct ownership. <u>Management/Control</u> : Black directors 33% of Black directors on its board by 2008. Black women directors 11% by 2008. Black Executives 4% by 2008.	<u>Ownership</u> : 30% equity subject to a range of conditions. <u>Management/Control</u> : 60% black people in the governing body with black women comprising 50% of the former.
Employment Equity	40% HDSA (Historically Disadvantaged South Africans) by 2007 10% women by 2007	Black top management 20-25% by 2008 Black women top management 4% by 2008 Black middle management 30% by 2008 Black junior management 40-50% by 2008 Women junior management 15% by 2008	50% black people in senior management positions with 30% black women as a % of the former. 65% of black people in other management positions with black women being 30% of the former.
Procurement	From HDSA over 3-5 years	50% by 2008 70% by 2014 Further targets per company categories	70% of eligible procurement from excellent, good and satisfactory BEE contributors (A minimum of 30% of the 70% procurement spend should be directed towards black owned, black empowered and black engendered SMME's that are excellent and good contributors to BEE)
Enterprise Development	Not addressed	Develop new and foster existing BEE companies (specifics provided))	Make quantifiable support equal to 5% of eligible procurement spend; in black owned, black empowered and black engendered SMME's that are excellent and good contributors to BE
Skills Development	Functionally & numerate literate by 2005 Career paths and Mentoring	1.5 % (as % of payroll spend)	2% (as % of payroll spend) Provision of learnerships equivalent to 5% of employees.

Residual/Other	<ul style="list-style-type: none"> -Licensing -Mine community and rural development -Housing & living conditions (hostels) -Nutrition -Migrant labour -Beneficiation State assets 	<ul style="list-style-type: none"> -Access to financial services -Corporate social investment/involvement: 0.5% (of operating profit after tax) by 2014 -HR development 	<ul style="list-style-type: none"> -Provision of ICT's in education, district health systems and those set out in licence conditions -General corporate social investment that enhances the lives of black people.
Financing	R100 billion by 2007 for HDSA	R 75 billion for HDSA participation	The ICT Charter Council to make proposals for the establishment of a special BEE fund to finance the acquisition of equity from established companies in the ICT industry.
Scorecard	None	Financial Sector Scorecard.	ICT sector Scorecard.

The information in this table reflects the status at time of writing.

Information sourced from: <http://www.dti.gov.za/bee/beecharTERS.htm> (Accessed on 2 December 2006).

8.4 APPENDIX 4: BEE DEALS CONCLUDED IN THE FINANCIAL SERVICES, MINING AND ICT SECTORS

MINING SECTOR BEE DEALS

Industrial Sector	Sub Sector	Target Company	Source Company	Stake (%)	Value (Rm)
Oil and Gas	Oil Services	Uhambo Oil Limited	Tshwarisano and partners	25	5000
Mining	Platinum	Lonplats	Incwala Resources	18	3361.4
Mining	Other Mineral Extractors and Mines	Xstrata-SA Chrome	SA Chrome/Xstrata SA	17.5	1435
Mining	Other Mineral Extractors and Mines	JCI Ltd	OrlyFunt Holding	0	1400
Mining	Other Mineral Extractors and Mines	Idwala Industrial Holdings Limited	Tiso Group	52	938
Mining	Gold Mining	Western Areas Ltd (WAL)	Inkwenkwezi Consortium	13	515.2
Mining	Other Mineral Extractors and Mines	Khumama Platinum	Mvelaphanda Resources Ltd	50	313
Mining	Gold Mining	Randgold & Exploration Company Ltd	OrlyFunt Holding	not disclosed	144.9
Mining	Coal	Mooiplats and Holfontein	Luvhomba Mining	51	130
Mining	Other Mineral Extractors and Mines	Nozalela Mineral Sands	Ingonyama Trust/Dube & Mkwana Tribal Authorities	5	75
Mining	Coal	Spitzkop Colliery	Ilanga Mining Corporation Pty Ltd	100	70
Mining	Diamond	Etruscan Resources Incorporated	Mvelaphanda Exploration	0	41
Mining	Platinum	Anglo Platinum and Platinum Group Metals	Africa Wide Mineral Prospecting and Exploration	26	35
Mining	Coal	Anglo Coal	Eyesizwe Coal (Pty) Limited	50	13
Mining	Other Mineral Extractors and Mines	Yomhlaba Resources Ltd (formerly Zenith Concessions)	New Africa Mining Fund (NAMF)	50.1	10.8
Mining	Other Mineral Extractors and Mines	Anooraq Resources Corporation	Pelawan Investments	63	9.25
Mining		Life Diamonds	Jomo Sono		not disclosed
Mining	Other Mineral Extractors and Mines	Imerys South Africa Limited	Nghala Mining	26	not disclosed
Mining	Coal	Sasol Mining	Eyesizwe Coal (Pty) Limited	15	not disclosed
Mining	Other Mineral Extractors and Mines	Assore LTD	Mampa Investment Holdings	46	not disclosed
Mining	Coal	Riverside Anthracite Colliery	Khulani Resources/Wave Capital	26	not disclosed
Mining	Other Mineral Extractors and Mines	Atscote	African Rainbow Minerals (ARMGold)	50.3	not disclosed
Oil and Gas	Oil Integrated	Lubrication Equipment	Links Capital	51	not disclosed

FINANCIAL SERVICES SECTOR BEE DEALS

Industrial Sector	Sub Sector	Target Company	Source Company	Stake (%)	Value (Rm)
Banks	Banks	FirstRand Ltd	FirstRand Empowerment Trust	10	6800
Banks	Banks	ABSA Group Ltd	Batho Bonke Consortium	10	5000
Banks	Banks	Standard Bank Group Ltd	Tutuwa Consortium and partners	10	4100
Insurance	Insurance Brokers	Liberty Group Ltd	Tutuwa Consortium and partners	10	1300
Insurance	Insurance Brokers	Metropolitan Holdings Ltd	Kagiso Trust Investment Company	10.25	540
Speciality and Other Finance	Asset Managers	Stanlib Asset Management	Quantum Leap Investments	25.2	350
Investment Companies	Investment Companies Eligible	Fabcos Investment Holdings (FIH)	Johnnic Holdings	50	295
Investment Companies	Investment Companies Eligible	Qakazana Investment Holdings	Four Arrows	12	238.08
Life Assurance	Life Assurance	African Life Assurance Company Ltd	Mvelaphanda Consortium	10	235
Speciality and Other Finance	Asset Managers	Mzi Khumalo	African Harvest Capital (Pty) Limited	70	200
Investment Companies		Four Arrows	Tiso Group	75	178
Speciality and Other Finance	Asset Managers	Coronation Investment Management	Imvula Trust	10	153
Speciality and Other Finance	Asset Managers	Frater Asset Management	Sakhikamva Investments	9	136
Investment Companies	Investment Companies Eligible	Brait SA	African Vanguard Consortium	26	123.8
Investment Companies	Investment Companies Eligible	IPS	The Bidvest Group Ltd	100	55.2
Investment Companies	Investment Companies Eligible	Cadiz Holdings Limited	Worldwide Capital (WWC)	10	55.175
Real Estate		PA Group	New deal trust	26	52
Real Estate	Real Estate Holding and Development	Capital Property Fund	Shanduka Properties	5	50
Investment Companies	Investment Companies Eligible	Mettle Ltd	Merilyn Investments (Pty) Ltd	38	48.7
Speciality and Other Finance	Asset Managers	Cadiz Holdings Limited	Makana Financial Services	10	41.1
Life Assurance	Life Assurance	Channel Life	Arch Equity	37	31
Investment Companies	Investment Companies Eligible	Iliad Africa Investment (Pty) Ltd	Women Private Equity Fund 1 (WPEF)	10	26.9
Speciality and Other Finance	Other Financial	Computershare South Africa	Black Management Forum Investment Company (BMFI)	26	26
Investment Companies	Investment Companies Eligible	PSG Group Ltd	Arch Equity	10	24.2
Investments		Sterling FS	BEE consortium	40	20
Insurance	Insurance Brokers	Apex investment Corporation Ltd	Brimstone Investment Corporation Limited	18	15.51
Speciality and Other Finance	Other Financial	PSG Group Ltd	Arch Equity	2.9	14.68
Banks	Banks	Capitec Bank Holdings Ltd	Arch Equity	1.15	9.48
Life Assurance	Life Assurance	Bensure Management Services	Sekunjalo Investments Limited (SKJ)	not disclosed	9.1
Banks	Banks	Brimstone Investment Corporation Limited	Peoples Bank	10	6.7
Insurance	Other Insurance	Lion of Africa Insurance	Brimstone Investment Corporation Limited	9	3.6

Industrial Sector	Sub Sector	Target Company	Source Company	Stake (%)	Value (Rm)
Real Estate	Property Agencies	Key Letting CC	Mathomo Group Limited	100	2.3
Speciality and Other Finance	Other Financial	Faranani Risk Solutions	Vukani Mafrika Investments Consortium	20	0.25
Real Estate	Real Estate Holding and Development	Ovland Real Estate	Encha Properties	32	not disclosed
Real Estate	Real Estate Holding and Development	CB Richard Ellis (CBRE) SA	Broll Property Group	100	not disclosed
Insurance	Other Insurance	Sanlam Ltd	Basebenzi Investments	60	not disclosed
Speciality and Other Finance	Other Financial	Credit Management Solutions	Mineworkers' Investment Company (MIC)	25	not disclosed
Real Estate	Real Estate Holding and Development	Engel & Volkers	Moshebi Investments	30	not disclosed
Speciality and Other Finance	Asset Managers	Prescient Investment Management	Bonitas Consortium	35.8	not disclosed
Real Estate	Real Estate Holding and Development	Gensec Property Services	Montsi Consortium	45	not disclosed
Speciality and Other Finance	Other Financial	Aucor South	Ikamva Labantu	50	not disclosed
Investment Companies	Investment Companies Eligible	Stanlib Asset Management	Ditkeni Investment Company Limited	1.625	not disclosed
Investment Companies	Investment Companies Eligible	Property Fund Managers	Shanduka Properties	50.4	not disclosed
Speciality and Other Finance	Asset Managers	Nedbank Treasury Asset Management	Taquanta Consortium	30	not disclosed
Speciality and Other Finance	Other Financial	NiB Securities	Taquanta Consortium	29	not disclosed
Speciality and Other Finance	Other Financial	Lereko-Metier Capital Growth	Lereko Investment / Metier Fund	51	not disclosed
Speciality and Other Finance	Other Financial	Nedcor Treasury Management Services	Taquanta Consortium	30	not disclosed
Real Estate	Real Estate Holding and Development	JHI Real Estate	Phatsima and Mpande	35	not disclosed
Speciality and Other Finance	Other Financial	Decillion Capital	African General Equity (AGE)	60	not disclosed
Speciality and Other Finance	Other Financial	Ethos Private Equity	Sphere Investment Holdings	24.25	not disclosed
Real Estate	Real Estate Holding and Development	Oasis Property Management	Broll Property Group	50	not disclosed
Life Assurance	Life Assurance	Safrican Insurance Co Ltd	Sanlam Life	55	not disclosed
Real estate	Real Estate Holding and Development	McCormick Property Development Ltd	Shanduka Properties	not disclosed	not disclosed

ICT SECTOR BEE DEALS

Industrial Sector	Sub Sector	Target Company	Source Company	Stake (%)	Value (Rm)
Software and Computer Services	Internet	Dimension Data SA (Pty) Ltd (DDSA)	Ngcaba Consortium	25.01	380
Software and Computer Services	Computer Services	BytesTechnology Group Ltd	Kagiso Trust Investment Company (KTI)	27	228
Software and Computer Services	Computer Services	AST Group Ltd	Gijima Technologies Group (Pty) Ltd	30	108
Software and Computer Services	Internet	DataPro Group Ltd (Formerly Casey Investments)	Casey Investment Holdings	100	53.77
Software and Computer Services	Computer Services	Prism Holdings Ltd	Mineworkers' Investment Company (MIC)	16.89	36
Information Technology Hardware	Telecommunications Equipment	Spescom Ltd	Vantage Capital Group	25.4	24
Software and Computer Services	Internet	DataPro Group Ltd (Formerly Casey Investments)	Vantage Capital Group	23	22
Software and Computer Services	Computer Services	Phambili Information Technologies	Gijima Technologies Group (Pty) Ltd	50	12
Information Technology Hardware	Computer Hardware	Pinnacle Technologies	Rakunda Investments Holdings	26	12
Software and Computer Services	Computer Services	Mthombo IT Services (M-IT)	Khumalo Brothers	35	11
Information Technology Hardware	Telecommunications Equipment	CCI	CCI's employees	51	6
Software and Computer Services	Software	Striata	J & J Group Ltd	25.1	4.5
Software and Computer Services	Computer Services	Bryant Technology Ltd	Zamori 243 (Pty) Ltd	85.22	0.24
Software and Computer Services	Computer Services	Alcatel	New Seasons	30	not disclosed
Software and Computer Services	Software	Square One Solutions Group	Utho Technologies	56.4	not disclosed
Software and Computer Services	Software	Izazi	Mineworkers' Investment Company (MIC)	25	not disclosed
Software and Computer Services	Computer Services	Allied Technologies (Altech)	Pamodzi Investment Holdings	25	not disclosed
Information Technology Hardware	Computer Hardware	Advanced Consumables Technology	Mthombo IT Services (M-IT)	26	not disclosed
Software and Computer Services	Computer Services	Technology Corporate Management	Management	25.01	not disclosed
Software and Computer Services	Software	Computer Science Corporation (CSC)	Nokusa and Cornastone	0	not disclosed
Software and Computer Services	Computer Services	EPI-USE Systems	Avalanche Consortium	45	not disclosed
Software and Computer Services	Computer Services	CommsCo	Circle Capital Ventures	50	not disclosed
Software and Computer Services	Computer Services	IST Group Ltd	Swanvest 320 (Pty) Ltd	25	not disclosed
Software and Computer Services	Computer Services	Enterprise Outsourcing Holdings (EOH)	BEE Employee Trust	25	not disclosed
Software and Computer Services	Computer Services	Masterskill	Employees	26	not disclosed

Industrial Sector	Sub Sector	Target Company	Source Company	Stake (%)	Value (Rm)
Software and Computer Services	Software	Tecor Group (Pty) Ltd	Lithalelanga Connections Holdings	63	not disclosed
Software and Computer Services		Lawyers Access Web (L@W)	Vantage Capital Group	10	not disclosed
Software and Computer Services	Software	Kindle Insurance Technologies (Pty) Ltd	PDI Groups	30	not disclosed
Software and Computer Services	Computer Services	DataPro Group Ltd (Formerly Casey Investments)	Vantage Capital Group	23	not disclosed

Tables Sourced from Shubane, K & Reddy, C 'Behind The Deals' (2005) *BusinessMap Foundation: Economic Transformation and Empowerment* at 17-19 & 28.

8.5 APPENDIX 5: BLACK CONTROL ON THE JSE

	<i>NO FIRMS</i>	<i>MAR CAP (Rbn)</i>	<i>Portion of JSE (%)</i>
Oct-97	17	37	3
Nov-97	26	52	4
Feb-98	27	55	5
Jul-98	28	68	6
Sep-98	28	48	4
Nov-98	33	66	7
Jan-99	35	59	6
Apr-99	35	67	6
Aug-99	38	53	4
Nov-99	36	42	3
Feb-00	36	61	4
May-00	32	37	3
Aug-00	33	98	6
Nov-00	34	78	5
Feb-01	22	84	5
Mar-02	26	38	2
Jun-02	26	39	2
Sep-02	22	33	2
Dec-02	22	44	3
Mar-03	21	40	3
Jun-03	21	42	3
Sep-03	21	43	3
Dec-03	21	58	3

Table extracted from Reddy, C 'Empowerment on the JSE'
(2004) *BusinessMap* 55 at 56.

8.6 APPENDIX 6: THE BEE SCORECARDS: A COMPARISON

THE 2004 COMPREHENSIVE SCORECARD⁴³⁵

Core Components	BEE Elements	Code Ref.	Weighting	Indicators	Indicator Weighting	Targets	Sub-minimum	Bonus/ Preferential Weighting Provisions
Direct Empowerment	Ownership	BEE 100	20%	Unrestricted Voting Rights in the Enterprise in the hands of Black people	3%	25.% + 1 vote		Introduction of new entrants and BEE ownership in excess of target
				Unrestricted Voting Rights in the Enterprise in the hands of Black women	2%	10%		
				Economic Interest in the Enterprise to which Black people are entitled	4%	25%		
				Economic Interest in the Enterprise to which Black women are entitled	2%	10%		
				Economic Interest in the Enterprise to which Black designated groups are entitled	1%	2.5%		
				Level of Unrestricted entitlement of Black people to receive their Economic Interest in the Enterprise (as percentage of total ownership)	8%	25%		
	Management	BEE 200	10%	Weighted Management Representation Scorecard (See BEE 200)	10%	40%		Women Management. Different management positions weighed according to seniority and executive involvement
Human Resources Development	Employment Equity	BEE 300	10%	Weighted Employment Equity Scorecard (See BEE 300)	10%	50%		Women representation
	Skills Development	BEE 400	20%	Investment in Skills Development (In addition to skills development levy), as a percentage of payroll	15%	3%		Fast-track programs for black employees and management. Provision of skills development programs and learnership in priority skill areas.
				Learnership- learnership positions (as a percentage of employees)	5%	3%		
Indirect Empowerment	Preferential Procurement	BEE 500	20%	Affirmative Procurement from Excellent BEE Contributors (BEE Percentage Score as per scorecard, between 80 and 100 points)	18%	50%		- Procurement from excellent contributors (recognized at R 1.25 for every R1 of spend) - Procurement from good contributors (recognized at R 1 for every R1 of spend) - Procurement from satisfactory contributors (recognized at 50c for every R1 of spend)
				Affirmative Procurement from Good BEE Contributors (BEE Percentage Score between 65 and 79)				
				Affirmative Procurement from Satisfactory BEE Contributors (BEE Percentage Score between 45 and 65)				
				Implementation of robust, independent verification and reporting mechanism to avoid fronting	2%	Mechanism which verify BEE status of suppliers reported under preferential procurement and utilization of dti approved accreditation agencies		
	Enterprise Development	BEE 600	10%	Monetary Investment in SMME with excellent or good BEE contributions (as percentage of Net Asset Value/EBITDA/Total Procurement)	8%	5% - 10% (depending on base used)		The sum percentage score achieved through monetary investment and quantifiable non-monetary support are summed to arrive at the enterprise development points. (The maximum achievable percentage score for enterprise development is 10)
				Quantifiable non-monetary support to SMME with excellent or good BEE contributions (as percentage of Net Asset Value/EBITDA/Total Procurement)	2%	2% - 5% (depending on base used)		
	Residual Element	BEE 700	10%	Industry specific initiatives to facilitate the inclusion of black people in the sector (as a percent of net profit)	10%	3%		Total contribution towards these initiatives are summed relative to net profit of an enterprise. The total achievable percentage score for these initiatives is 10. (Initiatives that does not promote the empowerment of black people are specifically excluded)
Industry specific initiatives to promote black economic empowerment (as a percent of net profit)								
Corporate social investment initiatives in health, education, poverty alleviation and community development(as a percent of net profit)								
Total	Element Weighting		100%	Indicator Weighting	100%	Sub-Minimum		

⁴³⁵ C000S000 of 2004 (n 158) para 57.

THE 2005 SIMPLIFIED SCORECARD⁴³⁶

Element	Weighting	Primary Codes Reference
Ownership	20 points	Code 100
Management control	10 points	Code 200
Employment equity	10 points	Code 300
Skills development	20 points	Code 400
Preferential procurement	20 points	Code 500
Enterprise development	10 points	Code 600
Residual	10 points	Code 700

⁴³⁶ C000S000 (n 12) para 8.

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